Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALLIED VAN LINES, INC.,
Petitioner,

v.

GERALD OBERG, *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Older Workers Benefit Protection Act, a terminated employee can sue his former employer for age discrimination, while at the same time retaining increased severance payments and other benefits received in exchange for a release of all claims against the employer, on the theory that the release was an invalid waiver under the Act and that therefore the employee may retain the benefits of the release without any of the burden.

2. Whether, even assuming that a terminated employee may bring an age discrimination suit in such circumstances, the affected employer, having been deprived of the benefit of its bargain, may assert legal or equitable claims for the return of the consideration provided in exchange for the release.

STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, petitioner Allied Van Lines, Inc. states that its parent company is NFC plc. Allied has no non-wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Allied Van Lines, Inc., by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-12a) is reported at 11 F.3d 679. The opinions of the district court (App. 13a-34a) and an oral ruling of the district court (App. 35a-65a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1993. A petition for rehearing was denied on January 10, 1994. App. 66a-67a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 201 of the Older Workers Benefit Protection Act ("OWBPA"), 104 Stat. 978, 983-84 (Oct. 16, 1990), added a new subsection (f) to Section 7 of the Age Discrimination in Employment Act ("ADEA"). This provision, which is codified in 29 U.S.C. § 626(f), is reproduced in the Appendix at 87a-89a.

STATEMENT

Factual Bankground

Respondents are three former employees of petitioner Allied Van Lines, Inc. ("Allied"). In December 1990, as a result of a corporate restructuring and difficult economic conditions, Allied reduced the size of its workforce. Allied terminated respondents' employment and that of approximately 60 other employees. App. 2a-3a, 13a-14a, 32a. At the time, respondent Gerald Oberg was 52 years of age, respondent Nicholas Tautz was 62, and respondent Steven Adams was 41.

Allied's preexisting standard severance plan offered respondents a choice at the time of their termination: Either they could receive the standard two weeks' severance pay generally available under the plan, without releasing Allied from any causes of action, or they could receive substantially enhanced severance benefits in exchange for entering into an agreement releasing Allied from all claims "arising from and during employment or as a result of termination . . . ." App. 3a & n.1. The enhanced severance benefits offered to respondents were substantial. Based on the grade of their positions at Allied, respondents Oberg and Adams were offered up to 18 weeks of severance pay, and respondent Tautz was offered up to 22 weeks of such pay, to be paid in biweekly installments until respondents obtained new employment or the specified number of weeks expired, whichever occurred first. In addition, all three respondents were offered continued health benefits and pension

contributions that together increased the value of their special severance package by 23% of the total available cash severance payments. App. 16a.

These additional severance payments and other benefits were not offered as an incentive for respondents to resign or give up their employment. They were offered at the time of respondents' termination, on the condition that respondents execute a release in favor of Allied.

All three respondents accepted the enhanced severance benefits offered under Allied's plan, and all three signed and returned the Separation Agreement releasing Allied from all claims (explicitly including any claims under the ADEA) and promising not to file any such claims against Allied in the future. App. 3a n.1, 15a, 29a-30a. The Agreement further provided that any breach would forfeit the enhanced severance benefits and that, in the event of a breach, any such benefits already conveyed would be returned. *Id.* Thereafter, Allied paid respondents the full amount of special severance pay, which amounted to $25,717.23 for Tautz, $15,871.51 for Oberg, and $12,887.70 for Adams. Allied also provided the additional health benefits and pension contributions that respondents had been promised. Respondents accepted and retained all of these payments and benefits, and never returned or offered to return any of them to Allied. App. 2a-3a, 16a.

But respondents did not keep their part of the bargain. Promptly after they received the last of the special severance payments, respondents filed charges of age discrimination against Allied with the Equal Employment Opportunity Commission.[1] Then, as soon as the prescribed 60-

[1] Oberg received his final severance payment on April 18, 1991, and filed his EEOC charge a week later, on April 25, 1991. Tautz received his final severance payment on May 17, 1991, and filed his EEOC charge three weeks later, on June 6, 1991. Adams received his final severance payment on April 18, 1991, and filed his EEOC charge on July 31, 1991. App. 16a. The record shows that at least

day period following the filing of the EEOC charges had expired (*see* Section 7(d) of the ADEA, 29 U.S.C. § 626(d)), respondents filed this action in the United States District Court for the Northern District of Illinois. They purported to sue not only on their own behalf but also on behalf of an alleged class of similarly situated former Allied employees.

The Proceedings and Decisions in the District Court

Respondents asserted that the releases they signed were invalid under the OWBPA. They did not contend that the releases failed to satisfy any of the OWBPA requirements for individual waivers. In fact, it is undisputed that the releases:

a) were written in understandable English;

b) specifically referred to claims under the ADEA;

c) did not involve any waiver of claims arising after the date of the release;

d) were given in exchange for additional consideration to which respondents were not otherwise entitled;

e) advised respondents to consult with an attorney prior to executing the agreement;

f) gave respondents 21 days to review and consider the release; and

g) gave respondents seven days after execution of the agreement to revoke the agreement.

See 29 U.S.C. § 626(f)(1)(A), (B), (C), (D), (E), (F)(i), and (G).

Respondents claimed, however, that the releases were "requested in connection with an exit incentive or other

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one respondent, Tautz, was represented by counsel as early as January 1991, yet continued to act as if the release agreement was binding by continuing to accept payments from Allied.

employment termination program offered to a group or class of employees," and that therefore two additional requirements had to be met. Respondents alleged that they should have been given 45 days, rather than 21 days, to review and consider the release before signing it. *See* 29 U.S.C. 626(f)(1)(F)(ii). Respondents also claimed that they should have been informed of the job titles and ages of all Allied employees to whom enhanced severance benefits were offered after termination and the ages of all Allied employees in the same job classification or organizational unit who were not terminated or not offered enhanced severance benefits. *See* 29 U.S.C. § 626 (f)(1)(H). Allied took the position that its reduction in force did not involve any "exit incentive or other employment termination program offered to a group or class of employees" within the meaning of the OWBPA and that therefore these two additional requirements were inapplicable and the releases were valid under the statute.

Allied also believed that, in any event, the validity of the releases at the time they were given did not need to be determined in order to dispose of this action. That is because respondents accepted and retained their enhanced severance payments and other benefits and never returned or offered to return any of these benefits to Allied, even after respondents undeniably had learned all of the facts alleged in the complaint and decided to sue. Based on this undisputed fact, Allied moved to dismiss, or, in the alternative, for summary judgment. Allied argued that, even if respondents were correct about the validity of the releases when given, respondents' subsequent conduct in retaining their enhanced severance benefits ratified the releases, and respondents' failure to tender back the additional consideration received for the releases precluded respondents from filing suit in violation of the releases' terms.

Respondents stipulated to the accuracy of all of the facts set forth in the Statement Of Material Facts As To Which There Is No Genuine Issue that accompanied Al-

lied's motion (App. 14a n.2), but they argued that no ratification of an invalid waiver is possible under the OWBPA. They contended that they should be permitted to keep the special benefits they received in exchange for the releases and nevertheless to conduct themselves as if the releases did not exist.

The district court denied Allied's motion. Although the court initially appeared to acknowledge that Allied's motion only assumed for the sake of argument that the releases were invalid when given (App. 14a, 17a), the court then proceeded as if defects in the releases already had been conclusively established. Without analyzing the meaning of the OWBPA's references to "an exit incentive or other employment termination program offered to a group or class of employees," the court announced that "Allied ignored a crucial portion of the statute and flouted Congress' clear command that employees be provided this information [*i.e.*, the information described in 29 U.S.C. § 626(f)(1)(H)]." App. 24a.

The court then held that, because the OWBPA was intended to protect the rights of older workers, no ratification of an allegedly defective waiver is possible. Likewise, the court held that persons signing an invalid release should not be required, as a precondition of disregarding the release and initiating legal action, to return the additional compensation received. The court said that "Allied got what it bargained for—a faulty release for special severance benefits." App. 24a-26a.

The district court provided that, in the event respondents prevail in their ADEA action, "[f]unds paid by Allied for the defective releases will be a setoff against any damages recovered . . . ." App. 26a. The decision made no provision for any recovery of the additional consideration paid to respondents in the event Allied prevails on the ADEA claims.

Allied asked the district court to certify its decision for immediate appeal under 28 U.S.C. § 1292(b), and the

court did so. App. 26a-28a. While Allied's request for leave to appeal was pending in the court of appeals. Allied answered the complaint and counterclaimed for a return of the consideration paid in exchange for the releases.

The district court had not yet addressed any of the issues raised by the alleged class aspects of the litigation, and no notice had been sent to the purported class members. Respondents sought to avoid any obligation to inform members of the alleged class that one possible outcome of the litigation might be a judgment ordering unsuccessful plaintiffs to return to Allied the enhanced severance benefits paid in exchange for the disputed releases. Accordingly, only eight days after the filing of Allied's counterclaim, respondents answered and moved for summary judgment on the counterclaim. They contended that, even if their ADEA claims were found to be entirely without merit, Allied would not be entitled to recover any portion of the special severance payments it made.

Less than a week after the filing of respondents' motion, before Allied had had any opportunity to respond and without any advance notice, respondents sought to have their motion heard and decided at a previously scheduled status conference. Respondents asserted that an immediate ruling was essential so that the district court's views on the counterclaim could be reflected in the notices to be sent to members of the alleged plaintiff class, and so that those notices could be mailed in sufficient time to enable prospective class members to opt-in to the class before an alleged statute of limitations issue could arise. App. 38a, 55a. Over Allied's repeated objections (*see, e.g.*, App. 40a, 44a, 46a, 53a), the district court endorsed the procedure advocated by respondents and issued an oral ruling granting summary judgment for respondents on Allied's counterclaim. The court decided that a damage counterclaim cannot be based on the act of filing a lawsuit in violation of a waiver agreement that was invalid under the OWBPA. App. 60a-61a. The court denied

Allied's request to certify this ruling for an interlocutory appeal under 28 U.S.C. § 1292(b). App. 62a, 65a. Notwithstanding respondents' stated reasons for the irregular procedure that they urged on the district court, respondents have not, to this day, sent any notices to members of the alleged plaintiff class.

Shortly after the district court's ruling on Allied's counterclaim, the court of appeals granted Allied's petition under 28 U.S.C. § 1292(b) for leave to appeal the district court's earlier decision. App. 68a-69a. Respondents then returned to the district court and asked the court to reconsider its refusal also to certify the decision on Allied's counterclaim. The district court reversed its previous position and granted 1292(b) certification, and the court of appeals again granted leave to appeal. App. 33a-34a, 70a-71a.

The Court of Appeals' Decision

The court of appeals affirmed. App. 1a-12a. It began by stating that the district court "found" that Allied had offered respondents the Separation Agreements "in connection with a group employment termination program." App. 6a. Characterizing this supposed ruling as a factual finding subject to a clearly erroneous standard of review, the court ruled that the standard was satisfied because Allied terminated the employment of approximately 60 other employees in addition to respondents in late 1990. Accordingly, the court held that the 45-day consideration period prescribed in 29 U.S.C. § 626(f)(1)(F)(ii) and the information requirements prescribed in 29 U.S.C. § 626(f)(1)(H) applied to respondents' releases and that those releases therefore were unenforceable when given. *Id.*

The court then turned to Allied's argument that, even if the releases were voidable when executed, respondents ratified those releases by retaining the additional severance benefits received as consideration. The court rejected the

legal possibility of an invalid ADEA waiver ever becoming subsquently ratified. App. 6a-8a. In the court's words (App. 8a),

> No matter how many times parties may try to ratify such a contract, the language of the OWBPA, "[a]n individual may not waive", forbids any waiver. *See* 29 U.S.C. § 626(f)(1). Therefore, we hold, as a matter of law, that [respondents] cannot ratify their Severance Agreements by retaining the consideration they received from Allied.

Likewise, the court rejected Allied's argument that respondents should be required, as a precondition of bringing their suit, to tender back the consideration received for the Separation Agreements. App. 8a-10a. The court acknowledged that, in cases arising before the enactment of the OWBPA, there was a split in the circuits concerning whether such a tender should be required as a precondition for a suit brought in violation of an allegedly invalid ADEA waiver. *Compare Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992) (no tender required), *with Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) (tender required). Without identifying any language in the OWBPA addressing the issue, the court held that respondents "were not required to tender back their severance benefits before filing their ADEA claims, notwithstanding [respondents'] previously executed waiver of all claims against Allied." App. 10a. The court relied largely on this Court's decision under a very different statute, the Federal Employers' Liability Act ("FELA"), in *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968).

Finally, the court of appeals sustained the district court's summary judgment on Allied's counterclaim. App. 10a-12a. The court held that Allied's "breach-of-contract action fails because an unenforceable contract cannot be enforced." App. 11a. The court also rejected Allied's rescission claim, on the ground that respondents were not suing to rescind the Separation Agreement, which "was

already dead by force of law." *Id.* The court acknowledged the cogency of Allied's argument that respondents "should not keep all of the severance benefits if the waiver contract fails." *Id.* The court held, however, that, although Allied's position "has appeal," Allied did not "plead specifically any recoverable claim," and therefore Allied is limited to obtaining a set-off against any award respondents may receive in their ADEA action. App. 11a-12a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the interpretation and application of the waiver provisions of the OWBPA. The resolution of these issues can be expected to affect many thousands of employment terminations each year, as businesses restructure, downsize, or consolidate in response to changing economic conditions.

The central issues are whether respondents, by accepting and retaining the enhanced severance benefits provided by Allied, ratified their earlier waivers, and whether respondents, having failed to tender back the consideration they received for their releases, should be precluded from pursuing legal action (including this case) in derogation of those releases. The ratification issue involves principles of contract law, and the "tender back" issue concerns whether equity should bar an action in violation of a promise for which valuable benefits were received and retained. Although analytically distinct, these issues lead to the same conclusion in this case and should produce identical real-world effects: Respondents' lawsuit should not be permitted to go forward.

If allowed to stand, the decision below inevitably will lead to increased litigation under the ADEA. It will discourage employers from offering enhanced severance benefits in exchange for releases, and, to the extent employers *do* offer such benefits, it will encourage terminated employees to accept the benefits and then to pursue the very kind of litigation the employers sought to avoid. Indeed,

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under the court of appeals' rulings, the litigation could be financed by the very severance payments intended to prevent such future disputes.

There is now a direct conflict among the circuits on the principal questions presented here. Five weeks after the court of appeals' decision in this case, the Fifth Circuit reached a diametrically opposite result, and expressly declined to follow the ruling below. *See Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 543 (5th Cir. 1993) (reprinted in App. 72a-86a). In the Fifth Circuit's words,

> we find ourselves in respectful disagreement with the Seventh Circuit's recent decision in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), in which the court concludes without any analysis of the doctrine of ratification, that "[n]o matter how many times parties may try to ratify [a waiver] contract, the langauge of the OWBPA '[a]n individual may not waive', [sic] forbids any waiver." *Id.* 11 F.3d at 682 * 3. We believe that the court's conclusion in *Oberg* is at odds with the legislative history and congressional intent behind the OWBPA . . . and overlooks the legal theories that define the doctrine of ratification of voidable contracts.

Id. at 540 n.11 (App. 82a n.11).

The current conflict under the OWBPA mirrors the conflict that arose on the same kind of issue under the ADEA, before the OWBPA was enacted to amend that statute. *Compare Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir. 1991) (finding ratification), *with Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991) (rejecting "tender back" requirement). The disagreement among the courts of appeals is thus not a new one, and it cannot be expected to be resolved on its own, if the Court does not intervene.

Nor is the conflict one that easily can be permitted to persist. The questions are of widespread significance,

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potentially affecting virtually all terminations of employees over the age of 40. Congress has created a federal system for handling age discrimination claims, and the application of that system should not be allowed to vary dramatically from circuit to circuit. Employers in Illinois should not be precluded from relying on a ratification or "failure to tender back" defense at the same time as employers in Texas are prevailing on that basis. Employers with operations in many states should not be required to operate under different federal regimes, and the venue of choice for age discrimination claims against such employers should not be determined by which court will allow special severance payments to be retained while the lawsuit proceeds.

This Court should grant review to rectify the errors of the court of appeals and to establish that former employees may not litigate age discrimination claims at the same time as they retain special payments that they received for promising not to do so.

I. THE COURT OF APPEALS' DECISION PRODUCES IRRATIONAL RESULTS NEVER INTENDED BY CONGRESS

Allied terminated respondents' employment in early December 1990, a month and a half after enactment of the OWBPA. The releases signed by respondents complied with all of the OWBPA requirements for individual waivers but did not provide the 45-day consideration period or the demographic information required for waivers obtained in connection with an "employment termination program offered to a group or class of employees . . . ." In exchange for the releases, and in accordance with Allied's preexisting severance benefit plan, respondents received substantial financial payments and other benefits to which they otherwise would not have been entitled. Under the court of appeals' ruling, respondents may keep these benefits and nevertheless sue Allied under the ADEA. Nothing in the OWBPA dictates or even contemplate such a result.

Under Allied's plan, respondents had a choice of severance packages. If they chose not to accept enhanced benefits, respondents were entitled to two weeks' severance pay, and they were also entitled to pursue any legal claims they may have had against Allied. If respondents are now dissatisfied with the bargain they struck in December 1990, and wish to disavow their promise not to sue, they should at least be required to restore the status quo that existed before Allied proposed the special severance package. The OWBPA determines only whether respondents' waiver is or is not valid and enforceable. It neither says nor implies that respondents should be permitted to retain the consideration they received for a release that they now wish to ignore. Contrary to the district court's view (App. 26a), Allied did not bargain for a faulty release. It bargained for a good release, and it did not get what it bargained for. As the present action demonstrates, respondents gave nothing of value in exchange for their special severance payments, and those benefits therefore should be returned.

The logic of the court of appeals leads to very unpalatable results. For example, an employee in respondents' position—*i.e.*, one who has been asked to execute a waiver in exchange for enhanced severance pay—could determine, either on his own or with the advice of counsel, that the proposed waiver does not comply with all of the requirements of the OWBPA. He could then execute the waiver anyway and accept the proffered payments, knowing from the outset that he did not intend to abide by the waiver but instead intended to sue his former employer under the ADEA.[2] This sort of conduct would be downright fraudulent. The OWBPA was not designed to encourage it. Yet that is the consequence of the court of appeals' decision.

The court of appeals' opinion also disregards both the difficulty that an employer may encounter in attempting

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[2] The record shows that at least one respondent, Tautz, retained counsel no later than January 1991, near the beginning of the five-month period during which he received special severance payments.

to comply with the OWBPA waiver provisions and the ease with which a former employee seeking to escape a waiver can create an issue of fact about the waiver's validity under the statute.

Consider, for example, the requirement in 29 U.S.C. § 626(f)(1)(H) that, "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," the employer must provide information as to

> (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The statute does not define "same job classification or organizational unit" and the phrase is fraught with the potential for dispute.[3] If an employer provides the required information based on its view of the relevant job classification or organizational unit, and a former employee later contends that a different classification or unit should have been used, any waiver obtained by the employer will be imperiled. If the employee's view of the relevant classification or unit ultimately prevails, any payment made for the waiver would, under the court of appeals' reasoning here, be little better than lost money.

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[3] Likewise, the OWBPA contains no elaboration on the phrase "exit incentive on other employee termination program," and it does not define what is meant by "a group or class of employees." The statute does not prescribe the time frame that an employer must consider in determining whether the termination of several employees during a period of weeks or months involves "a group or class of employees," nor does it provide whether multiple sites or facilities must be aggregated for the same purpose. The statute thus offers little guidance for employers like Allied, which must attempt to ascertain when the 45-day notice period of Section 626(f)(1)(F)(ii) and the special information requirements of Section 626(f)(1)(H) are triggered.

Considerations such as these helped to persuade the Fifth Circuit in *Wamsley* to endorse the notion that a waiver voidable under the OWBPA can nevertheless be ratified by an employee's subsequent conduct, *e.g.*, by his retaining the consideration received for the waiver even after learning that one or more of the requirements in Section 626(f) were not satisfied. 11 F.3d at 539 (App. 80a). As *Wamsley* emphasized, "one of the expressed purposes of the ADEA [was] 'to help employers and workers find ways of meeting problems arising from the impact of age on employment.' 29 U.S.C. § 621(b)." *Id.* *See also Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1652-54 (1991). The statute thus seeks to encourage settlement and compromise rather than litigation. As the Fifth Circuit explained (*id.*),

> [t]he simplest and easiest way to further this purpose is to give effect to private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation. Were employers forced to assume the risk that noncompliance with all of [the] statutory requirements of section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions.

Wamsley thus supports the proposition that the court of appeals' ruling in this case inevitably will generate further litigation under the ADEA.

Wamsley also illustrates the ease with which a former employee seeking to escape a waiver can create an issue of fact about the waiver's validity under the OWBPA. The "Notice Pertaining to Release of Claims" in *Wamsley* expressly informed the affected employees that they could take up to 45 days to consider the proposed release. 11 F.3d 536 (App. 74a). Nonetheless, former employees who executed the release later sued under the ADEA, alleging that the release was invalid because the employees were not given 45 days to consider it, as required under 29 U.S.C. § 626(f)(1)(F)(ii). The employer moved to dismiss based on the release, and it also submitted affi-

davits "specifically denying that [the employees] were told to execute and return the releases prior to the expiration of the 45-day period." *Id.* at 537 (App. 76a). The employees responded with affidavits of their own, claiming that they were told orally by certain employer representatives that, to receive benefits under the Termination Pay Plan, they had to execute the release no later than their termination date, which was less than 45 days after they received the notice. This, the court of appeals held, was sufficient to create an issue of fact precluding summary judgment as to the validity of the waivers under the OWBPA. *Id.* at 538 (App. 77a). As the court later observed in explaining its further holding that the waivers were not void but voidable, and hence subject to ratification,

> the nature of [the employees'] attack on the agreements assured [the employees] of a fact issue with which to avoid summary judgment on [the issue of the validity of the waivers]. Thus, were we to conclude that [the employees'] waiver agreements were void from their execution, [the employer] would be facing continued litigation with opponents who could use, and possibly have used, to finance their suit, the very funds [the employer] paid as consideration to avoid litigation.

Id. at 539 n.9 (App. 80a-81a n.9).

The court of appeals' decision in the present case is objectionable for a further reason. The court acknowledged that, in the event respondents prevail in their ADEA action, the severance payments made by Allied "may be deducted from any award determined to be due [respondents]." (App. 12a). The court failed to address, however, what will happen if *Allied* prevails in the ADEA action. In that event, there will be no damage award against which to offset the severance payments. Allied will have been found not liable for any discrimination, Allied will have borne the considerable expense of litigation, *and* Allied will also have been denied any recovery of the severance payments made to respondents. In the name of advancing the policies of the OWBPA,

a company that did not discriminate on the basis of age will be treated more harshly than one that did. Congress cannot have intended this bizarre result.

II. THE ASSERTED GROUNDS FOR THE COURT OF APPEALS' DECISION DO NOT SUPPORT THE OUTCOME BELOW

The court of appeals held that if a waiver fails to comply with any of the requirements of the OWBPA, the waiver may not be ratified no matter how many times the parties may try to do so. The court ruled that the language of the OWBPA compels this conclusion. In fact, the court acknowledged that in the absence of the OWBPA the court "may have even been inclined to follow *Grillet* and *O'Shea*, and allow employees the freedom to ratify their severance agreements through general principles of contract law." App. 7a. The court decided, however, that since the enactment of the OWBPA, ratification simply is not possible.

The court of appeals has read into the OWBPA provisions that are not there. The statute does not address the question of ratification nor does it discuss whether an employee seeking to disclaim a waiver may do so without tendering back the consideration he received for the waiver. The statute's purpose is more limited. It merely sets forth the requirements that must be met for a waiver to be enforceable as written. If those requirements are not satisfied, the employer will not be entitled to insist on enforcing the waiver as originally given. But this cannot mean that the employee is forever precluded from waiving his claims no matter how much he may wish to do so. Taken to its logical conclusion, the reasoning of the court of appeals would preclude even a settlement and release after a former employee had consulted counsel and threatened legal action. There is no evidence either in the language of the statute or in its legislative history that Congress intended to preclude compromise or ratification even after an employee has consulted counsel and plotted a course of action. As the Fifth Circuit held in *Wamsley*,

> We do not interpret the language of section 626 (f)(1) to mean that a waiver which fails to meet the requirements of subsections (A) through (H) is void of legal effect. Rather, we interpret it to mean that such waivers are not knowing and voluntary and thus are subject to being avoided at the election of the employee. This interpretation comports with the language of section 626(f)(1) and is supported by the legislative history of the OWBPA.

11 F.3d at 539 (App. 79a). For these reasons, the Fifth Circuit held that "neither the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA." *Id.* at 539-540 (App. 81a). The court of appeals' contrary conclusion in this case is not supported by the statutory text on which the court relied.

Nor is the decision below supported by this Court's disposition in *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968), a case brought under the Federal Employers' Liability Act. *Hogue* is distinguishable for at least three reasons.

First, the respondent carrier in *Hogue* confessed error in this Court and declined to argue that the applicable law required a tender back of the consideration paid by the carrier for an employee's release. The issue, therefore, was not controverted in this Court, and the Court dealt with the case in a brief *per curiam* opinion entered without the benefit of adversary presentations.

Second, the Court's limited holding in *Hogue* focused squarely on the parties' mutual mistake regarding the extent of the employee's injuries. The employee injured his knee while working in the respondent carrier's shop. Liability under the FELA was not disputed. The parties believed, however, that the injury was not a particularly serious one, and the carrier therefore paid the employee $105 in exchange for a full release. Thereafter, it was determined that the employee was permanently injured, requiring two operations, one of which caused him to lose

a kneecap. Under these circumstances, the Court held that the employee did not need to tender back the $105 in order to maintain an action for further compensation under the FELA. In the Court's words, "[w]e hold that a tender back is also not requisite when it is pleaded that the carrier and the employee entered into the release from mutual mistake as to the nature and extent of the employee's injuries." 390 U.S. at 517. No such mutual mistake of fact is at issue in this case.

Third, and perhaps most important, there is a substantial difference between the FELA and the ADEA, and that difference bears directly on *Hogue*'s applicability to the present dispute. As the Fifth Circuit explained in *Wamsley*, the FELA was designed with purposes far different from those of the ADEA. The FELA was intended to provide liberal recovery for injured workers and thus to shift from the workers to the railroads the heavy cost of the severe injuries suffered in railroad operations. The statute deliberately stripped employers of their common law defenses and sought to encourage " 'unburdened and expeditious recoveries' " by injured rail workers. 11 F.3d at 541 (App. 84a), *quoting Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979). By contrast, in the ADEA, Congress sought to foster employment based on ability rather than age and to prohibit arbitrary age discrimination. Congress created a new right of action, but it did not express a desire actively to facilitate an ADEA claimant's recovery. 11 F.3d at 541 (App. 84a-85a). Whereas the FELA is a statute under which liability is a given in most cases and typically the principal issue is the quantification of damages, liability is almost always a critical issue under the ADEA, and the statute creates no presumption that a termination of employment was motivated by age discrimination. In the Fifth Circuit's words,

> the FELA has effectively rendered liability of the employer a given in the great majority of cases, leaving quantification of damages as the principal focus of settlement negotiations. No such inference of liability exists as to ADEA claims; mere termination of em-

> ployment is not sufficient to establish liability. An ADEA claimant faces the burdensome task of proving that the termination of his employment was the result of unlawful age discrimination. Therefore, the elements to be considered in the settlement of an ADEA claim involve not only damages, but also the more critical issue of threshold liability.

11 F.3d at 542 (App. 85a-86a). The *Wamsley* court therefore concluded that "the Seventh Circuit in *Oberg* . . . improperly analogized the FELA to the ADEA and, thus, arrived at the erroneous conclusion that *Hogue* precludes a 'tender back' requirement in suits brought under the ADEA." *Id.* at 541 n.13 (App. 85a n.13).

In reaching its decision, the court of appeals here relied almost entirely on its textual analysis of the OWBPA and on *Hogue*. It did not endorse the district court's further rationalizations of the result reached in the courts below. In any event, those rationalizations are sheer speculation, and find no support in either the language or the legislative history of the OWBPA. There is no basis, in record evidence or otherwise, for the assertion that respondents or other employees would be unable to tender back their enhanced severance payments if they were required to do so as a condition of maintaining their ADEA action. App. 25a. Ability to tender back has never been put in issue here. Respondents have not offered to return their enhanced benefits and sought a payment schedule that would enable them to do so over a period of time. Rather, they have simply sought to retain those benefits and nevertheless to sue Allied under the ADEA.

Likewise, there is no basis for the district court's statement that a tender requirement would encourage employers to ignore the specific provisions of the OWBPA. App. 25a. Employers who seek releases in exchange for substantial cash payments would hardly be eager to see the prospect of litigation restored by a return of those payments. Rather, like Allied, such employers seek to obtain a lasting release and freedom from future litigation. They therefore have a strong incentive to ensure that releases are enforceable from the outset under the OWBPA.

III. THE COURT OF APPEALS ERRED IN REJECTING ALLIED'S COUNTERCLAIM

Allied filed its counterclaim on September 9, 1992, contending that, even if respondents' ADEA action could go forward, Allied should retain a claim in the litigation for the return of the enhanced severance payments. Allied in fact received nothing of value in exchange for these payments, and respondents therefore were unjustly enriched. Moreover, respondents' Separation Agreements expressly provided that breach of the Agreements would forfeit the enhanced severance benefits and that, if those benefits had already been conveyed at the time of a breach, they would be returned. App. 29a.

Respondents answered and moved for summary judgment on the counterclaim on September 17, eight days after it was filed, and the district court heard argument on the motion on September 23, without permitting Allied to submit any response. The court disregarded numerous requests by Allied for an opportunity to file papers in opposition to the motion (*see, e.g.*, App. 40a, 44a, 46a, 53a), and granted summary judgment orally at the September 23 hearing.

In sustaining this decision, the court of appeals rejected Allied's counterclaim for breach of contract in a single sentence: "Defendants[']] breach-of-contract action fails because an unenforceable contract cannot be enforced." App. 11a. The court did not explain what in the OWBPA precludes an employee from agreeing that, if he decides to sue his former employer notwithstanding a release (whether valid or invalid), he will give back the money he received in exchange for that release.

Turning to Allied's contention that respondents should not be permitted to keep the severance benefits if the waiver fails, the court agreed that "the idea has appeal," but it held that Allied "failed to plead specifically any recoverable claim." Without any reference to Fed. R. Civ. P. 15(a) or the possibility of amending a pleading as to which summary judgment was granted only two weeks after it was filed, the court announced that "any of

[Allied's] possible equitable counterclaims not raised before the trial court have been waived." App. 11a. This was quite an ironic twist. Under the court's decision, respondents, who signed a written waiver agreement and received tens of thousands of dollars in exchange for it, did not waive anything. Allied, which complained repeatedly about respondents' retention of their severance payments after this suit was filed, and which received nothing in exchange for those payments, is held to have waived any claim for their return.

This Court should grant review to resolve the conflict among the circuits, to determine the proper interpretation of the OWBPA, and to rectify the injustice of allowing respondents to take and keep Allied's money and simultaneously to pursue this lawsuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 11, 1994

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 92-3472, 92-3893

GERALD OBERG, *et al.*,
Plaintiffs-Appellees,
v.

ALLIED VAN LINES, INC., *et al.*,
Defendants-Appellants.

Argued Sept. 9, 1993

Decided Nov. 23, 1993

Rehearing and Suggestion for Rehearing
En Banc Denied Jan. 10, 1994

George F. Galland, Jr. (argued), Mark S. Kende, Davis, Miner, Barnhill & Galland, Chicago, IL, and Charles Barnhill, Jr., Davis, Miner, Barnhill & Galland, Madison, WI, for plaintiffs-appellees.

Keith A. Dorman, Ross & Hardies; and Brian W. Bulger (argued), and Carolyn C. Gessner, Katten, Muchin & Zavis, Chicago, IL, for defendants-appellants.

Robert E. Williams, Douglas S. McDowell and Ann Elizabeth Reesman, McGuiness & Williams, Washington, DC, for Equal Employment Advisory Council, amicus curiae.

Gwendolyn Young Reams, Carolyn L. Wheeler, Donald R. Livingston, and Dori K. Bernstein (argued), E.E.O.C., Office of Gen. Counsel, Washington, DC, for E.E.O.C., amicus curiae.

Before FLAUM and MANION, Circuit Judges, and REYNOLDS, Senior District Judge.*

FLAUM, Circuit Judge.

In this case, Gerald Oberg, Nicholas Tautz and Stephen Adams ("Plaintiffs") were all employees of Allied Van Lines, Inc., ("Allied"). As part of a reduction in force, Allied fired the Plaintiffs along with approximately 60 other employees. Contesting their termination, Plaintiffs filed suit against Allied and its parent company NFC Consortium ("Defendants") under the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 626 (1967). The Defendants moved to dismiss the suit under Rule 12(b)(6), or alternatively for summary judgment under Rule 56, proffering special severance agreements ("Severance Agreements") executed by the Plaintiffs. In the Severance Agreements the Plaintiffs promised that in return for extra severance pay, they would agree to hold Allied harmless against future lawsuits. The district court denied the Defendants' motions and then certified its order to this court for interlocutory review pursuant to 28 U.S.C. § 1292(b). We affirm.

I. Facts

At the time of the firings, Allied offered each Plaintiff a choice between two severance benefits packages: (1) the standard severance package of two weeks' salary, or (2) approximately twenty weeks of additional pay in return for executing the Severance Agreement. Specifically, the additional severance pay would have been $15,871.51 for Oberg, $25,717.23 for Tautz, and $21,887.70 [*sic*;

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* The Honorable John W. Reynolds, Senior District Judge of the Eastern District of Wisconsin, sitting by designation.

should be $12,887.70] for Adams, each payable in bi-weekly disbursements. Further, the Severance Agreement provided that each of the Plaintiffs would continue to receive health benefits and pension contributions during the term of the disbursements.

In their Severance Agreements, the Plaintiffs promised that they would release Allied from all claims (including claims under ADEA) "arising from and during employment or as a result of the termination" and that they would not file any subsequent claim against Allied. *Oberg v. Allied Van Lines Inc.*, No. 91 C 6576, 1992 WL 211506 (N.D.Ill.1992) (Modified Memorandum Opinion and Order) (hereinafter, "*Oberg*, Order").[1] The Severance Agreements also provided that in the event of Plaintiffs' breach, the Plaintiffs must return to Allied all severance benefits.[2]

After all Plaintiffs received their last severance disbursement, they each filed charges of age discrimination

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[1] The Severance Agreements between Plaintiffs and Allied provided in pertinent part the following:

> The undersigned hereby releases, remits, acquits and discharges Allied Van Lines, Inc., . . . from any and all claims, . . . for any and all liability . . . arising from any and all losses . . . including, but not limited to claims of discrimination under and federal, state, or local law, rule or regulation or worker's compensation or disability claims under state or local laws and specifically any rights or claims under the Age Discrimination in Employment Act. This release, related to claims arising from and during employment or as a result of termination, is for any relief, no matter how denominated, including but not limited to wages, back-pay, compensatory damages or punitive damages. The employee further agrees that he/she will not file or permit to be filed on his/her behalf any such claim.

Oberg, Order at 3 & Appendix A.

[2] The Severance Agreement provided the following: "Breach of this Agreement shall constitute a forfeiture of additional benefits referenced. If those benefits have already been conveyed as of the time of breach, the employee agrees that he/she will return these benefits." *Oberg*, Order at Appendix A.

against Allied with the Equal Employment Opportunity Commission ("EEOC"). After the sixty-day EEOC investigation period had expired on each of the Plaintiffs' EEOC complaints, the Plaintiffs filed their class action complaint alleging that Allied violated the ADEA. The Plaintiffs stipulated that they neither returned nor offered to return any of the severance benefits received from Allied for executing their Severance Agreements. The Defendants admitted that at the time Allied executed its group termination program, the new waiver provisions of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f) (1991) were in effect, and that the termination program offered to the Plaintiffs failed to include the OWBPA provisions provided under § 626(f)(1)(F) & (H).

The Defendants contend that even if the Severance Agreements were initially invalid for failing to comply with OWBPA, the Plaintiffs ratified their Severance Agreements by continuing to accept Allied's additional severance payments. Thus, the Defendants moved to dismiss the entire complaint under Rule 12(b)(6) or to grant summary judgment under Rule 56. The Defendants argued, in the alternative, that the Plaintiffs must at least tender back all their severance benefits received, as required under the Severance Agreement, before being allowed to maintain the ADEA suit. Defendants also counterclaimed for contract damages. The district court denied Defendants' motion while granting Plaintiffs' summary judgment motion over Defendants' counterclaims. We affirm the district court's ruling.

II. Analysis

In their appeal, Defendants argue the following four points that: (A) the Severance Agreements signed by Plaintiffs were valid and effectively waived Plaintiffs' right to sue Allied under ADEA, (B) even if the Severance Agreements were invalid, Plaintiffs subsequently ratified their waivers by accepting the severance benefits from

Allied, (C) the Plaintiffs must at least tender back the severance benefits before being allowed to maintain their ADEA suit against Allied, and (D) the district court improperly granted Plaintiffs summary judgment over Allied's contract counterclaims. We shall address these arguments serially.

A. Validity of Waiver

The Defendants first argue that the Severance Agreements drafted by Allied comply with all the requirements of OWBPA, and thus, their execution by Plaintiffs effectively waived Plaintiffs' rights and claims under ADEA. We disagree.

In November of 1991, Congress amended the ADEA, specifically limiting the manner in which an employee may waive the protections afforded under federal law, through the enactment of the OWBPA. 29 U.S.C. § 626(f). The language of the OWBPA text provides "An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). For the purposes of OWBPA, Congress specifically defined "knowing and voluntary" such that "a waiver may not be considered knowing and voluntary unless at a minimum . . ." a litany of statutory factors (A) through (H) are either satisfied or inapplicable. 29 U.S.C. § 626(f)(1)(A)-(H). Since the Defendants conceded before the court that their termination program offered to the Plaintiffs failed to include the OWBPA provisions provided under § 626(f)(1)(F) & (H), Defendants must explain why compliance with this subsection is not required in this case. Allied argues that its requested waiver is neither "in connection with an exit incentive program" nor "other employment termination program," and that its severance program was not "offered to a group or class of employees," thus rendering subsections (F)(ii) and (H) inapplicable.[3]

[3] Subsection (F)(ii) specifically provides as follows: "if a waiver is requested in connection with an exit incentive or other

The district court found that Allied had offered the Plaintiffs a waiver in connection with a group employment termination program. *Oberg v. Allied*, No. 91 C 6574 (N.D.Ill. Oct. 22, 1993) (Amended Order Granting Summary Judgment) (hereinafter, "*Oberg*, Amended Order").[4] We review such factual findings under a clearly erroneous standard. *United States v. Johnson*, 997 F.2d 248, 255 (7th Cir.1993). Because we believe that sixty plus employees terminated at one time satisfies OPBWA's definition of a group termination, the district court's factual findings clear the review standard. Thus, we conclude that Allied is not excused from the provisions of § 626(f)(1)(F) & (H). Furthermore, since the Defendants concede that the termination program they offered to the Plaintiffs failed to include the OWBPA provisions provided under § 626(f)(1)(F) & (H), Plaintiffs did not knowingly and voluntarily waive, as defined in the OWBPA, any right and claim allowed under the ADEA. *See* 29 U.S.C. § 626(f)(1). We therefore conclude that at the time of its execution, the Severance Agreements were unenforceable against Plaintiffs.

B. Ratification

Next, the Defendants argue that even if Plaintiffs' Severance Agreements were unenforceable at the time of their execution, Plaintiffs subsequently ratified their Sever-

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employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement." 29 U.S.C. § 626(f)(1)(F)(ii).

Subsection (H) specifically provides as follows: "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees" then the employer must give the employee certain written information specified. 29 U.S.C. § 626(f)(1)(H).

[4] Allied conceded that it gave Plaintiffs neither the 45 days as required by subsection (F)(ii), nor the written information specified in subsection (H). *Oberg*, Amended Order at 3.

ance Agreements by continuing to accept subsequent benefits from Allied. We again disagree.

Before Congress passed OWBPA, some circuits applied the common law doctrine of ratification, allowing employees and employers to waive ADEA provisions by entering into severance agreements. *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir.1991) (permitting an employee, who signed a severance agreement prior to enactment of OWBPA, to waive ADEA though subsequent ratification); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 177, 116 L.Ed.2d 139 (1991) (allowing ratification for ADEA waiver signed prior to OWBPA). Had Congress not spoken this court may have even been inclined to follow *Grillet* and *O'Shea*, and allow employees the freedom to ratify their severance agreements through general principles of contract law. However, Congress has occupied this area of the law through the enactment of the OWBPA.

The OWBPA limits the form in which an employee and employer may contract to waive the ADEA provisions. The OWBPA states that "[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). The OWBPA language plainly restricts an employee's freedom to waive his rights or claims under the ADEA. When the plain text of a statute is clear then "courts must presume that a legislature says in a statute what it means and means in a statute what it says. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, —— U.S. ——, ——, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) (citations omitted).

In interpreting the requirements of the OWBPA we assume that the statute's operative words carry the plain meaning within their context. Under OWBPA, unless a

waiver contract takes the form required by the statute, an employer and an employee cannot contract to waive the ADEA provisions. *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 412, 121 L.Ed.2d 336 (1992); *Isaacs v. Caterpillar, Inc.*, 765 F.Supp. 1359 (C.D.Ill.1991). In both *Forbus* and *Isaacs*, former employees filed suit under ADEA, contravening a previously executed promise not to sue their employer. *Forbus*, 958 F.2d at 1038; *Isaacs*, 765 F.Supp. at 1362. As is the case here, none of the waiver contracts were initially valid when executed. *Forbus*, 958 F.2d at 1040; *Isaacs*, 765 F.Supp. at 1369. Both courts rejected the legal possibility of an invalid ADEA waiver ever becoming subsequently ratified, even if the employee were to continue accepting the agreement's benefits. *Forbus*, 958 F.2d at 1040; *Isaacs*, 765 F.Supp. at 1373. We agree with *Forbus* and *Isaacs*. No matter how many times parties may try to ratify such a contract, the language of the OWBPA, "[a]n individual may not waive", forbids any waiver. *See* 29 U.S.C. § 626(f)(1). Therefore, we hold, as a matter of law, that Plaintiffs cannot ratify their Severance Agreements by retaining the consideration they received from Allied.

C. Tender Back

Defendants further argue that, at a minimum, the Plaintiffs must tender back the consideration received for executing the Severance Agreements. Initially, Defendants' argument seems appealing under common law notions of fairness. Furthermore, the circuits may appear split as to whether an employee, who sues in violation of an executed severance agreement, must tender-back to his employer those severance benefits before maintaining his suit. *Compare Forbus*, 958 F.2d at 1041 (stating that employees "should not be required to tender their retirement benefits back to [employers] as a prerequisite to the maintenance of their lawsuit"), *and Isaacs*, 765 F.Supp. at 1366 (rejecting any tender requirement in ADEA cases), *with*

Grillet v. Sears, 927 F.2d 217, 220 (5th Cir.1991) ("A party seeking rescission must attempt to restore the *status quo ante*—that is, to return the parties to the position they held just before they entered into the agreement").[5] In resolving the tender back issue, we find the reasoning in *Forbus* and *Isaacs*, relying on Supreme Court precedent, compelling.

While the Supreme Court has not considered the tender back issue in an ADEA case, the Court has considered the issue in the context of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* (1939). *See Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968). In *Hogue*, the Court rejected any notion that state common law principles could help resolve the tender back question in FELA cases. The Court stated that "[t]he question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law." The Court went on to hold that an employee, who previously executed an employer release, need not, as a precondition to bringing his suit under FELA, tender back to his employer any of the consideration he received for executing the release. *Id.* at 517. The Court did, however, state that the benefits paid should be deducted from any award to the employee. *See id.* at 518.

Subsequently, the Eleventh Circuit and the Central District of Illinois both applied the reasoning of *Hogue* to ADEA cases. *See Forbus*, 958 F.2d at 1041 ("ADEA plaintiffs are not required to tender the consideration received for releases as a condition prerequisite to chal-

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[5] *Grillet* may be distinguished from *Forbus* and *Isaacs* in that the *Grillet* court considered a plaintiff suing under a claim of wrongful inducement thus seeking rescission of the severance agreement. 927 F.2d 221 ("The law of contracts requires a party claiming wrongful inducement to seek rescission shortly after discovering the misrepresentation.") After OWBPA, neither the facts of *Forbus*, *Isaacs*, nor those before the court today, present the same common law contract issues as were before the *Grillet* court.

lenging those releases in court"); *Isaacs*, 765 F.Supp. at 1366 (reasoning that *Hogue* prohibits a tender requirement in ADEA suits). Noting the factual similarities between *Forbus* and *Isaacs*, and this case, we are convinced that the reasoning behind *Forbus* and *Isaacs*, analogizing the policy of ADEA to that of FELA, and thus applying *Hogue*, is correct. Therefore, we hold that Plaintiffs were not required to tender back their severance benefits before filing their ADEA claims, notwithstanding Plaintiffs' previously executed waiver of all claims against Allied.

D. Summary Judgment on Counterclaims

Defendants have appealed the district court's grant of summary judgment on their counterclaims arguing that the court denied Defendants both adequate notice and an opportunity to respond to Plaintiffs' summary judgment motion, as required under Fed.R.Civ.P. 56(c) and Circuit Rule 50. Specifically, Defendants complain that the court failed to afford Defendants the full ten days notice on Plaintiffs' motion, as required by Rules 56(c) and 50. In response, we observe that such objections must be raised before the trial court or they are forever waived. *See Tripp v. May*, 189 F.2d 198, 199-200 (7th Cir.1951) (holding that a litigant waives any violations of Rule 56(c)'s ten day requirement if he fails first to object before the trial court). Thus, Allied waived its chance to appeal these procedural matters by waiting until this appeal to raise the issue. Furthermore, noncompliance with the ten-day rule, or with other procedural provisions in Rule 56, is not grounds for reversal unless the nonmovant is able to show it could have offered evidence to create a material issue of fact. *See Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 391 (7th Cir.1981) ("where no potential disputed material issue of fact exists, a summary judgment will not be disturbed even though the district court disregarded the procedure which should have been fol-

lowed."); *see also Tripp*, 189 F.2d at 200; *see Ikerd v. Lapworth*, 435 F.2d 197, 203 (7th Cir.1970). A failure to afford ten days notice is not grounds for reversal unless the non-movant can show prejudice. *Ikerd*, 435 F.2d at 203; *Chicago-Midwest Meat Ass'n. v. City of Evanston*, 589 F.2d 278, 282 (7th Cir.1978). In *Chicago-Midwest*, we refused to reverse despite noncompliance with the ten-day rule because "[i]f we assume the existence of all the facts alleged by [Chicago-Midwest], its challenges to the local ordinances fail nonetheless." *See id.* at 282. The same is true here.

Assuming all the facts alleged in Defendants' counterclaims, all their arguments fail. Defendants breach-of-contract action fails because an unenforceable contract cannot be enforced. Further, Defendants' rescission argument also must ultimately fail. It may be true that if a party is suing to rescind a contract, he must first tender back [6] the consideration, *see Pan-American Petroleum & Transp. Co. v. United States*, 273 U.S. 456, 47 S.Ct. 416, 71 L.Ed. 734 (1927); *United States v. Texarkana Trawlers*, 846 F.2d 297 (5th Cir.) *cert. denied*, 488 U.S. 943, 109 S.Ct. 369, 102 L.Ed.2d 358 (1988); however, here Plaintiffs are not suing to rescind their contract; their contract was already dead by force of law. Finally, Defendants cogently argue that Plaintiffs should not keep all of the severance benefits if the waiver contract fails. While the idea has appeal, Defendants have failed to plead specifically any recoverable claim. We cannot speculate as to the possible merit of hypothetical claims since any of Defendants' possible equitable counterclaims not raised before the trial court have been waived. *See House v. Belford*, 956 F.2d 711, 720 (7th Cir.1992) (stating that such claims not first raised at the trial court have been waived and cannot be

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[6] As discussed earlier, the Plaintiffs have no tender-back requirement to maintain their ADEA action. *See infra* discussion of *Hogue*, *Forbus* and *Isaacs*.

considered on appeal). In this case Defendants may only obtain a set-off of the severance benefits paid from any award determined to be due Plaintiffs. *See Hogue,* 390 U.S. at 518, 88 S.Ct. at 1152.

Therefore, assuming the truth of all the facts alleged by Defendants, its challenges to the district court's summary judgment fail. Since no potential disputed material issue of fact exists, the summary judgment on Defendants' counterclaims will not be disturbed even if the provisions of Fed.R.Civ.P. 56(c) and Circuit Rule 50 were not observed.

III. Conclusion

The Severance Agreement drafted by Allied did not comply with the requirements of OWBPA, and thus Allied cannot enforce its Severance Agreement against the Plaintiffs to waive their ADEA claims. Also, since OWBPA proscribes any ADEA waiver that fails to meet OWBPA's provisions, Plaintiffs cannot ratify the Severance Agreement by failing to tender back severance benefits. Further, Plaintiffs need not tender their severance benefits back to Allied as a prerequisite to the maintenance of an ADEA lawsuit. Finally, the district court properly dismissed all Defendants' counterclaims with prejudice. Those counterclaims not before raised have been waived. The severance benefits Defendants paid to Plaintiffs may be deducted from any award determined to be due Plaintiffs.

Therefore, for the foregoing reasons, the district court's order is AFFIRMED and this case is REMANDED for trial on the merits in accordance with this opinion.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 91 C 6576

Hon. Paul E. Plunkett

GERALD OBERG, NICHOLAS TAUTZ, and STEVEN ADAMS, on behalf of themselves and persons similarly situated,
Plaintiffs,

v.

ALLIED VAN LINES, INC., NFC CONSORTIUM,
Defendants.

MODIFIED MEMORANDUM OPINION AND ORDER

On October 15, 1991, Gerald Oberg, Nicholas Tautz, and Steven Adams filed a class action suit against their former employer Allied Van Lines ("Allied") and its parent company NFC Consortium ("NFC") in which they allege that Allied violated the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, when it discharged over 60 employees from its Illinois offices in December 1990. Allied and NFC [1]

[1] NFC filed a separate motion for summary judgment on December 18, 1991; however, no briefing schedule has been set on the motion. Footnote 1 of Allied's motion to dismiss states, "In the event that [NFC] is not dismissed as a defendant in this action, . . . NFC (HSD) and NFC (USA) then join with Allied in this motion . . . ." Because NFC Consortium has not yet been dismissed from this action, we are considering Allied's current motion as a joint one with NFC.

moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) or in the alternative to grant summary judgment in their favor pursuant to Rule 56. On July 7, 1992, we advised the parties that we were converting Defendants' motion to dismiss into one for summary judgment.

In their motion, the Defendants explain that the named Plaintiffs signed a waiver that purported to release Allied from any and all claims arising from their employment with Allied, including claims under ADEA. For the purposes of their motion, the Defedants stipulate that the releases executed by the named Plaintiffs did not fulfill the requirements of the newly amended ADEA and thus were invalid when executed. Despite the fact that the releases were invalid when executed, Defendants contend that they are enforceable because Plaintiffs ratified them when they took and failed to tender back to Allied the consideration that Allied paid these employees to execute the releases. In light of recent amendments to the ADEA, specifically the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 983 (1990), we find that the Plaintiffs' failure to tender back the consideration provided by Allied did not constitute ratification of the invalid releases; hence, we deny Defendants' motion for summary judgment.

Background [2]

The named Plaintiffs Gerald Oberg, Nicholas Tautz, and Steven Adams were all employees of Allied. In December 1990, Allied eliminated their positions as part of a general reduction in force. At this time, Allied informed the three that their employment would be terminated. Allied's terminated employees usually receive only two weeks of benefits; however, Allied offered the

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[2] The facts outlined here are taken from the Defendants' Local Rule 12(m) Statement, which the Plaintiffs stipulated was accurate in open court on July 7, 1992.

three the opportunity to receive special severance benefits in exchange for their executing a "Separation Agreement" which purported to release Allied from potential legal claims. (Defs' Rule 12(m) Stmt. ¶¶ 3-6.)

Oberg, Tautz, and Adams signed Separation Agreements that are identical in all relevant respects. The agreement signed by Nicholas Tautz is reproduced at Appendix A. These Separation Agreements state in pertinent part:

> The undersigned hereby releases, remits, acquits and discharges Allied Van Lines, Inc., its past and present parents, subsidiaries, divisions, officers, directors, agents, employees, successors, and assigns (separately and collectively "RELEASEES'S [sic]) jointly and individually from any and all claims, known or unknown, which he/she, his/her heirs, successors or assigns have or may have against RELEASEES for any and all liability which they may have to him/her whether denominated claims, demands, causes of action, obligations, damages or liabilities arising from any and all losses, however denominated, including, but not limited to claims of discrimination under any federal, state, or local law, rule or regulation or worker's compensation or disability claims under state or local laws and specifically any rights or claims under the Age Discrimination in Employment Act. This release, related to claims arising from and during employment or as a result of termination, is for any relief, no matter how denominated, including but not limited to wages, backpay, compensatory damages or punitive damages. The employee further agrees that he/she will not file or permit to be filed on his/her behalf any such claim.

(Separation Agreements of Oberg, Tautz, and Adams.) The agreements also indicate in their first paragraph that special severance benefits were offered as consideration

for execution of the agreement. (Defs.' Rule 12(m) Stmt. ¶ 7.)

Gerald Oberg executed his Separation Agreement on December 14, 1990. In consideration for its execution he received 18 weeks of cash benefits with a total value of $15,871.51. (*Id.* ¶ 8.) Nicholas Tautz executed his Separation Agreement on December 4, 1990. In consideration, he received 22 weeks of cash benefits with a total value of $25,717.23. (*Id.* ¶ 9.) Steven Adams executed his Separation Agreement on December 26, 1990. In consideration, he received 18 weeks of cash benefits with a total value of $21,887.70 [*sic*; should be $12,887.70]. (*Id.* ¶ 10.) Each named Plaintiff also received continuing health benefits and pension contributions, which together increased the total value of each severance package by approximately 23 percent. (*Id.* ¶ 11.)

Each named Plaintiff received bi-weekly severance payments for the entire period of their eligibility, fulfilling Allied's obligations under the Separation Agreement. It is undisputed that none of the named Plaintiffs returned or offered to return the benefits that they received from Allied for executing their Severance Agreements.

Gerald Oberg and Steven Adams received their last benefit payment from Allied on April 18, 1991. On April 25, 1991, Oberg filed a charge of age discrimination against Allied with the Equal Employment Opportunity Commission ("EEOC"). Adams filed his charge with the EEOC on July 31, 1991. In his charge, Adams alleges that "In or about late January 1991, I learned that my duties were assumed by a younger employee." Nicholas Tautz collected his last benefit payment from Allied on May 17, 1991. On June 6, 1991, he filed a charge of age discrimination with the EEOC.

On October 15, 1991, two weeks after the sixty-day EEOC investigation period required by ADEA expired on Adams's charge, the Plaintiffs filed their class action Complaint alleging that Allied violated the ADEA.

In their motion, Defendants point to the Plaintiffs' retention of their benefits under the Separation Agreement. They contend that the Plaintiffs are seeking to "have it both ways, retaining the benefits of their Separation Agreements without abiding by their reciprocal obligations." (Defs.' Mem. Supp. Mot. Sum. J. at 1-2.) Defendants concede for purposes of their motion, that the Separation Agreements did not meet the stringent requirements of the ADEA as recently amended by the OWBPA. (*Id.* at 4.) However, they argue that by failing to tender back the consideration that they received from Allied, the Plaintiffs ratified the otherwise voidable agreements and are now bound by them.

Analysis

For defendants to prevail on a summary judgment motion, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). At this stage, we do not weigh evidence or determine the truth of asserted matters. We simply determine whether there is a genuine issue for trial, i.e. "whether a proper jury question was presented." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). If the nonmoving party bears "the burden of proof at trial on a dispositive issue, [however] . . . the nonmoving party [is required] to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)).

The threshold question in this suit is whether the Plaintiffs are barred by the releases that they signed from bringing a claim against their former employer Allied.

As mentioned above, the Defendants do not argue that the releases were valid and binding when executed; instead, they contend that the releases, which were invalid under the requirements of the ADEA, are enforceable now because the Plaintiffs ratified them.

A. *Pre-OWBPA Cases Concerning the Tender-Ratification Issue*

Defendants rely primarily on two cases, *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991), and *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir. 1991), for the proposition that ADEA releases invalid at the time of execution may later be ratified by employee-plaintiffs who take the full consideration paid them although they are aware that their releases are invalid. These two cases predate the enactment of the OWBPA. Prior to the OWBPA all that was required for an employee to waive their federal ADEA rights was for their release to be both knowing and voluntary—although the courts could not agree on what this required. *O'Shea*, 930 F.2d at 361.

In *Grillet*, the plaintiff signed a waiver after being told by her supervisor that Sears, her employer, had eliminated her position and all positions comparable to hers. In consideration for signing the waiver, Sears gave the plaintiff $36,000. A week after she executed the waiver, the plaintiff learned that Sears had offered new job assignments to three younger employees in her department. Nevertheless, over the next few months the plaintiff accepted her extra severance benefits. She then filed suit against Sears alleging that she had signed the waiver under duress and misrepresentation and, as a consequence, her waiver was not knowing and voluntary. *Grillet*, 927 F.2d at 218. Sears argued that even if the release was tainted by misrepresentation and duress, the plaintiff ratified it as a matter of law by accepting the full benefits of the agreement after she learned of the

misrepresentation. *Id.* at 220. The Fifth Circuit Court of Appeals agreed with the defendant, finding that despite the plaintiff's attempts to tender back the consideration provided her, she had ratified the release when she retained the consideration after learning that the release was voidable. *Id.* In reaching its conclusion, the court relied upon common principles of contract law: "A party cannot be permitted to retain the benefits received under a contract and at the same time escape the obligations imposed by the contract." *Id.*

The Fourth Circuit followed similar reasoning in *O'Shea.* In that case, the plaintiff O'Shea executed a release after being told that her position with the company had been eliminated. 930 F.2d at 359. Sometime after executing the release O'Shea learned that her former employer had hired new employees into her former position. *Id.* at 360. The court found that O'Shea's execution of the contract had been voluntary, deliberate, and informed and, consequently, was enforceable on that grounds. *Id.* The court also determined, in the alternative, that O'Shea had ratified the release when she accepted the consideration provided her. *Id.*

As Plaintiffs note, *Grillet* and *O'Shea* are not the only authority on this issue. Indeed, Plaintiffs point us toward two more recent cases involving pre-OWBPA ADEA releases, *Issacs* [*sic*] *v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991), and *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), which reach the opposite result: namely, that where invalid releases under the ADEA have been executed, there is no tender-back rquirement for instituting an ADEA suit. In *Isaacs,* one of our colleagues determined that a tender requirement would have a "crippling effect" on ADEA challenges and thus runs contrary to that statute's purposes. 765 F. Supp. at 1367. In reaching this conclusion, the *Issacs* [*sic*] court relied on the United States Supreme Court case of *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968),

which determined that tendering the consideration received for a release of liability under the Federal Employers Liability Act ("FELA") was not a prerequisite to bringing a FELA lawsuit. The *Issacs* [*sic*] court reasoned that "both the FELA and the ADEA are remedial statutes intended to protect employees," and thus a tender requirement should no more be a prerequisite in the ADEA context than in the FELA context. 765 F. Supp. at 1366-67. The court concluded that the tender requirement would interfere with the remedial purposes of ADEA, because it "will likely make it impossible for most employees to challenge ADEA releases—a result that Congress plainly does not want." *Id.* at 1367.

The Eleventh Circuit recently followed the reasoning in *Issacs* [*sic*] in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992). As it explained,

> The Court in *Hogue* found that a tender requirement would deter meritorious challenges to releases in FELA lawsuits. The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would, in our opinion, encourage egregious behavior on the part of employers . . . .

Id. at 1041. The *Forbus* court determined that "[t]he ADEA was specifically designed to prevent such conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case." *Id.*

B. *Effect of the Older Workers Benefit Protection Act*

As these cases indicate, courts were divided over the tender-ratification issue in ADEA cases prior to the enactment of the Older Workers Benefit Protection Act. A search of relevant authority has revealed that we are the

first court to confront the issue of whether an invalid release may be ratified by failure to tender back severance benefits in light of the OWBPA's more stringent requirements. After reviewing that Act and its legislative history, we conclude that a general tender requirement would interfere with both the Act's specific requirements and its general purpose concerning waivers of ADEA liability.

Section 201 of the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 983 (1990), states that "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." The Act goes on to detail the minimum requirements necessary for a waiver to be considered knowing and voluntary.[3] The Act also stipulates that the party

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[3] Title 26, section 626 now reads in pertinent part:

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the

asserting the validity of a waiver has the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary. 26 U.S.C.A. § 626(f)(3).

Some of the requirements imposed by the OWBPA are essentially informational in nature, designed to ensure that an employee confronted with a waiver form will be able to understand the ramifications of such a release and weigh the alternative. The Senate Committee Report concerning OWBPA states:

> The waiver must be part of a written settlement agreement which specifically identifies that rights and claims under the ADEA are being waived. This degree of clarity and specificity increases the chances that individuals will know their rights upon execution of a waiver.

S. Rep. No. 263, 101st Cong., 2nd Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1538.

> individual is given a period of at least 45 days within which to consider the agreement;
>
> (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;
>
> (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—
>
> (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Where the waiver is being offered to a group or class of employees pursuant to an exit incentive or employment termination plan, the Act requires that the employer provide each eligible employee with additional information in plain, written English:

> (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—
>
> > (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
> >
> > (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

29 U.S.C.A. § 626(f)(1)(H) (West 1992).

Congress included these additional informational requirements because it found that "group termination and reduction programs raise additional issues and require additional protection for individuals from whom a waiver is sought." 1990 U.S.C.C.A.N. at 1539. As the Senate Committee report explains,

> The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the

> ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

Id. at 1539. That report also makes clear that these informational requirements are meant to protect workers: "The special protection accorded with respect to exit incentive and group termination programs presuppose that affected individuals are not 'on guard' to protect their rights." *Id.* at 1540.

In the case before us, Allied apparently employed a group termination plan yet failed to provide Oberg, Tautz, and Adams the information required pursuant to the newly amended section 626(f). In failing to do so, Allied ignored a crucial portion of the statute and flouted Congress' clear command that employees be provided this information. Allied now asks us to enforce these defective releases on the theory—based entirely in common law contract notions—that the Plaintiffs ratified their releases by retaining the special severance benefits provided them as consideration for execution of the defective releases.

We believe that enforcing these releases pursuant to a tender-ratification theory in this case would circumvent both the language and purpose of the OWBPA. That Act clearly states "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." In order to find that the Plaintiffs ratified their defective releases, we would need to conclude that an individual may waive her ADEA rights by ratifying a waiver that was not knowing and voluntary when signed because it did not fulfill the Act's specific requirements. A waiver by this method is not provided for by the language of the Act and was not contemplated by Congress.

As Judge Mihm explained in *Issacs* [*sic*], finding a tender requirement after the passage of the OWBPA would

as a practical matter undo that Act's waiver provisions. 765 F. Supp. at 1367. He explained, "No matter how egregiously releases might violate the requirements of the Older Workers Benefit Protection Act, employees would be precluded from challenging them unless they somehow could come up with the money they were given when allegedly forced into retirement." *Id.* We agree with that a tender requirement would interfere with the Act's purpose and operation. Moreover, we believe that a tender requirement would encourage employers to ignore the specific provisions of the Act in hopes that by the time their former employees discover that the releases that they signed are voidable, they will be in no economic position to tender back or refuse to accept the special severance benefits accorded them.

Prior to the enactment of the OWBPA, a release that was not knowing and voluntary when initially executed might have become enforceable through ratification if the employee both gained the knowledge withheld from her at the time of the signing and then voluntarily retained the benefits of her bargain. This reasoning certainly undergirds *Grillet* and *O'Shea*.

We find that the OWBPA's strict requirements for a knowing and voluntary waiver preclude waiver by ratification. Moreover, we find that even if the Act does not entirely foreclose that possibility, ratification could only occur where, at a minimum, the employee receives all of the information that the OWBPA required. We need not reach the question of whether a defective waiver may be cured by later disclosure, however, because in our case none of the Plaintiffs received anything like the information required by the statute. Indeed, the only thing we know is that one of the Plaintiffs stated that he discovered in January 1991 that a younger person was placed in his former position, a position that his employer had told him would be terminated. This spare information falls far short of meeting the OWBPA requirements. The information eventually obtained by the

Plaintiffs in this case fulfills neither the purpose nor the letter of the Act: Oberg, Tautz, and Adams never received the information that would permit them to make an informed decision to sign the Separation Agreements in the first place or later to ratify them.

Allied complains that it has lost the benefit of its bargain, that it is unfair to permit the Plaintiffs to retain the special consideration that they received for executing the releases and then "double dip" by filing an ADEA lawsuit. We view the bargain differently. Allied had an opportunity to present its employees with a written waiver that met all of the OWBPA requirements. Had it done so, the facts and the result in this case would be different: certain employees might have decided not to sign the release and thus have forgone the special severance benefits, opting instead to gamble on a lawsuit. For those who did sign, however, Allied would have had a valid and enforceable release. In essence, Allied got what it bargained for—a faulty release for special severance benefits. It bears repeating that Allied had almost complete control over drafting the Separation Agreement that it offered its employees. Further, the Plaintiffs will not enjoy a double dip. Funds paid by Allied for the defective releases will be a setoff against any damages recovered by the Plaintiffs.

C. *Certification for Interlocutory Appeal*

Because this Order involves a controlling issue of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order may materially advance the ultimate termination of the litigation, we certify this Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[4]

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[4] Title 28, Section 1292(b) provides that a district judge may certify an order that is not otherwise appealable for interlocutory appeal if she finds (1) that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and (2) that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Whether the Plaintiffs ratified the release agreements by retaining the consideration they received unquestionably raises a controlling question of law. If our finding today was made in error and Defendants are correct in asserting that the releases signed by the Plaintiffs prohibit them from maintaining their current claims, we must enforce the releases and dismiss this case. As the *Isaacs'* court noted in certifying its order for interlocutory appeal,

> Defendant argues that the consideration received by the defendants in exchange for the payment of benefits to the plaintiff is the right to be free from a trial. If this view is correct, and if the defendant is forced to wait for a determination of the validity of the release . . . after a full trial, it will have lost the practical and legal effect of its bargain before it has an opportunity to have the issue reviewed. Thus, the matter is particularly appropriate for a determination before trial.

765 F. Supp. at 1375. As in *Isaacs,* the enforceability of the releases is obviously a threshold issue in this litigation. *See Ingram Corp. v. J. Ray McDermott & Co.,* 698 F.2d 1295, 1298 (5th Cir. 1983); *Grillet,* 927 F.2d at 220-221. Indeed, our Order is particularly well suited to interlocutory appeal because it involves a case of first impression with respect to the interpretation of the OWBPA and because the applicability of the tender-ratification doctrine to this area presents substantial grounds for difference of opinion.

Section 1292(b) certification is also appropriate because an immediate appeal would materially advance the ultimate termination of the litigation. As mentioned above, if the Seventh Circuit reverses our decision, the Plaintiffs' claim is barred. If this dispensation is reached, extensive pre-trial discovery and a trial—which would burden this Court, a jury, the witnesses, and parties—would be unnecessary. In *Isaacs,* the Seventh Circuit ultimately refused to accept the interlocutory appeal after the

district judge certified his order. Although the Court of Appeals did not provide a reason for its refusal, the salient fact in that case was that the dispositive motion was brought after extensive pre-trial discovery had been completed, thus only minor economy could have been achieved by an intermediate appeal. In contrast, the order in our case comes at the outset of the litigation and a reversal of our decision could save substantial public and private resources.

Now that we have certified our order for immediate appeal, the Defendants urge us to enter an order staying the entire litigation pending the resolution of the appeal. We decline to stay the entire litigation because we find that certain matters of limited scope can go forward with little cost to the parties and the Court. Thus, we enter a partial stay under which merits discovery and briefing on NFC's motion for summary judgment are stayed but the Defendants are required to answer the complaint, to file any compulsory counterclaims, and all parties must proceed in briefing and discovery on the Plaintiffs' Motion to Notify Class Members of Their Right to Opt Into This Lawsuit.

Conclusion

For the aforementioned reasons, we deny Defendants' Motion for Summary Judgment and certify our Order for interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). A partial stay is also ordered as outlined above.

ENTER:

/s/ Paul E. Plunkett
PAUL E. PLUNKETT
United States District Judge

DATED: Aug. 25, 1992

APPENDIX A

SEPARATION AGREEMENT FOR NICHOLAS TAUTZ

The employee understands that he/she will be receiving the following benefits outlined in the subsequent paragraph for signing this document by which the employee voluntarily terminates the employee-employer relationship. There are no other commitments, express or implied, by Allied Van Lines, Inc.

The mutually agreed upon separation date is December 3, 1990. You are eligible for two (2) weeks of base pay in lieu of notice. Beginning December 17, 1990, you are eligible for additional benefits in accordance with Allied Van Lines' Severance Plan. In addition, you will be paid for any accrued, unused 1990 vacation days, if any. Your coverage under Allied employee benefit plans will be continued, while you are receiving supplemental benefits, with the exception of the Long Term Disability benefits and life insurance. Long Term Disability and life insurance conversion applications may be obtained from the Human Resources Department. You have 31 days to exercise this option. Any questions should be directed to UNUM Life Insurance Company of America.

This document does not constitute an admission by Allied Van Lines, Inc. Breach of this Agreement shall constitute a forfeiture of additional benefits referenced. If those benefits have already been conveyed as of the time of breach, the employee agrees that he/she will return these benefits.

The undersigned hereby releases, remits, acquits and discharges Allied Van Lines, Inc., its past and present parents, subsidiaries, divisions, officers, directors, agents, employees, successors, and assigns (separately and collectively "RELEASEES'S") jointly and individually from any and all claims, known or unknown, which he/she, his/her heirs, successors or assigns have or may have against RELEASEES for any and all liability which they may have

to him/her whether denominated claims, demands, causes of action, obligations, damages or liabilities arising from any and all losses, however denominated, including, but not limited to claims of discrimination under any federal, state, or local law, rule or regulation or worker's compensation or disability claims under state or local laws and specifically any rights or claims under the Age Discrimination in Employment Act. This release, related to claims arising from and during employment or as a result of termination, is for any relief, no matter how denominated, including but not limited to wages, backpay, compensatory damages or punitive damages. The employee further agrees that he/she will not file or permit to be filed on his/her behalf any such claim.

Employee understands and acknowledges that this is a legal document and that the execution of this document has legal ramifications. Employee further acknowledges he/she has been advised by Allied that he/she may consult an attorney prior to execution of this agreement.

Employee further acknowledges that he/she has been advised by Allied that he/she shall have 21 days from the receipt of this document to review and consider whether to sign this agreement and shall have 7 days after signing this to revoke the agreement. Any revocation of this agreement must be in writing and must be received by Allied within ten (10) days of the signing of this agreement.

Employee agrees that he will not discuss the fact that he/she has been granted severance or the terms of this agreement with any employees of Allied or its agents. Employee further agrees that he/she will not in any way disparage Allied to any of Allied's outside consultants or customers with whom he/she has worked. Violation of these provisions will result in a termination of all benefits hereunder and the return of any benefits heretofore received.

By execution of this agreement the undersigned agrees to return all company property no later than December 7, 1990.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 6574

Judge Plunkett
Magistrate Judge Bucklo

GERALD OBERG, *et al.*,
Plaintiffs,

v.

ALLIED VAN LINES, INC., *et al.*,
Defendants.

AMENDED ORDER GRANTING SUMMARY JUDGMENT

On September 23, 1992, this Court issued an order granting plaintiffs' motion for summary judgment as to defendant Allied's counterclaims and denying defendant Allied's oral motion to certify its summary judgment order for interlocutory appeal under 28 U.S.C. § 1292 (b). On October 2, 1992, the Court of Appeals for the Seventh Circuit granted Allied's petition for interlocutory appeal under § 1292(b) as to this Court's prior ruling of August 25, 1992, which had denied Allied's motion for summary judgment as to plaintiff's claims. Following this action by the Court of Appeals, plaintiffs reconsidered their position as to the appropriateness of interlocutory appeal of this Court's ruling on the counterclaims, and moved this Court to certify that ruling under § 1292 (b). Upon consideration of this motion, and after hearing the arguments of counsel, the Court grants that motion, and issues the following amended order:

1. For the reasons stated at greater length in the Court's oral ruling of August 25, 1992 [*sic*; should be September 23, 1992], the transcript of which hearing is incorporated by reference in this order, plaintiffs' motion for summary judgment as to the counterclaims is granted and the counterclaims are dismissed with prejudice.

2. In particular, the Court finds that:

(a) It is undisputed that in December, 1992, Allied terminated a group of approximately 65 employees in a reduction in force. The group of employees terminated in connection with that reduction in force was offered the chance to sign a Separation Agreement containing (among other things) a waiver of all claims under the Age Discrimination in Employment Act and a waiver of the right to bring a lawsuit under the ADEA arising out of their termination. Upon signing these Agreements, plaintiffs would receive certain benefits in addition to those which they would have received had they not executed those Agreements.

(b) The Court finds under these undisputed circumstances that waivers of ADEA claims, and of the right to file an ADEA lawsuit, were "requested [by Allied] in connection with an exit incentive or other employment termination program offered to a group or class of employees" within the meaning of the Older Worker Benefit Protection Act (OWBPA), 29 U.S.C. § 626(f)(1)(F)(2). Accordingly, the OWBPA required Allied to give the affected employees, including the plaintiffs, a period of at least 45 days within which to consider the agreement, and required Allied to give the affected employees certain written information about the group of individuals covered by this program, and the job titles and ages of all persons selected for the program, and the ages of all individuals who are not eligible for or selected for the program.

(c) It is undisputed that Allied did not give plaintiffs 45 days to consider whether to sign the Agreements. The plaintiffs' Separation Agreements on their face reflect that the employees have only 21 days to consider whether to sign them.

(d) It is further undisputed, having been conceded by counsel for Allied in oral argument on September 23, 1992, that Allied did not give the plaintiffs the written information specified in 29 U.S.C. § 626(f)(1)(H).

(d) [*sic*; the court's order contains two subparagraph (d)'s] Accordingly, the Court finds as a matter of law that the plaintiffs' waivers of ADEA claims, and of the right to file an ADEA lawsuit, were obtained in violation of the OWBPA and are hence ineffective.

(e) The Court further finds that under the OWBPA, a damage counterclaim cannot be based on the act of filing a lawsuit in violation of a waiver agreement that was obtained in violation of the OWBPA itself. Accordingly, summary judgment is entered on the counterclaims in favor of plaintiffs and against Allied.

(f) The Court has previously ruled in its order of August 25, 1992 that plaintiffs have not "ratified" their Agreements through their failure to tender back to Allied the benefits they received when they signed the Agreements.

2. The Court further finds that its ruling "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." In particular, this Court's ruling on the claims depends in part on the prior ruling on "ratification." Since the Court of Appeals has determined to accept an interlocutory appeal from that ruling, it will materially advance the ultimate termination of the litigation for the Court of Appeals to consider the related counterclaim issue in the same interlocutory appeal.

3. Accordingly, the Court hereby certifies the present ruling granting summary judgment on the counterclaims for interlocutory appeal under 28 U.S.C. § 1292(b).

ENTER:

/s/ Paul E. Plunkett
United States District Judge

DATED: October 22, 1992

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 91 C 6576
Chicago, Illinois

GERALD OBERG, *et al.*,
Plaintiffs,

vs.

ALLIED VAN LINES, INC.,
Defendant.

September 23, 1992
11:00 o'clock, a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE PAUL E. PLUNKETT

PRESENT:

For the Plaintiffs:

MR. GEORGE F. GALLAND, JR. and
MR. MARK S. KENDE
Davis, Miner, Barnhill & Galland
Chicago, Illinois

For the Defendant:

MR. BRIAN W. BULGER
Katten, Muchin & Zavis
Chicago, Illinois

[2] THE CLERK: 91 C 6576, Oberg vs. Allied.

MR. GALLAND: Good morning, Judge.

THE COURT: Mr. Galland.

MR. GALLAND: George Galland for the plaintiff, with Mark Kende, K-e-n-d-e.

MR. BULGER: Good morning, your Honor. Brian Bulger for the defendants.

THE COURT: Mr. Bulger.

MR. GALLAND: Judge, thanks for putting aside this time for this morning. I thought that it would make some sense to appear before you without the pressure of others waiting in a call, and sort a couple of things out that will make things run smoothly from here on out.

I have a list of about three things that are sort of the order of business right now, if I could tick them off one by one—

THE COURT: Well, let me tell you what I've got. I have got the motion for summary judgment on the counterclaim, I have the motion to notify the class members, and I've still got NFC's motion for summary judgment.

MR. GALLAND: Correct. Now, there are a couple of things that you need to know about each of these motions. Our view is that the motion for summary judgment is the first order of business and that the Court ought to decide it as expeditiously as it can. We stated why in our motion. I don't know if [—]

[3] THE COURT: Let me ask you this question, Mr. Galland. Do you know what I don't quite understand— on your expedited basis— it's this:

You say that it's important to the people who might opt into the class to know the condition of the possible counterclaim, and I say yes, that makes sense, except the class opt-in people would have to be told that, even if this summary judgment were granted, this is all contingent on my view of the enforceability of these things

and that the Seventh Circuit may review, and I could be reversed.

MR. GALLAND: Well, that—

THE COURT: And, furthermore, even if I'm not, I may be wrong, in which case later sometime down the road the Seventh Circuit could say I was wrong.

In other words, there's no way to guarantee your opting in class members that they are immune from possible claims under a summary judgment—I mean, under the releases, no matter what I rule.

MR. GALLAND: Well, there are two responses to that, Judge, and I was ready for that question.

Number one is that in fact, as you will see from the motion for summary judgment, our view—although our main argument for summary judgment is that indeed the Older Worker Benefit Protection Act was not followed in this case, and that argument, if it prevailed—and I assume that, given your prior [4] ruling, it's going to—but if that argument prevails, then, sure, if the Seventh Circuit disagreed with you on the tender ratification ruling then that basis for summary judgment could some day down the road get overturned.

But the other argument for summary judgment on the counterclaims does not depend on whether you were right or wrong in your ruling, in your prior ruling. That second argument, which is based on the cases that I've cited in my brief, says that if we have a good faith basis for bringing a lawsuit that challenges the validity of these releases under the OWBPA then we cannot be subjected to a damage counterclaim for bringing that.

That was the alternative basis for Judge Mihm's holding dismissing the counterclaims in Issacs and was the basis for the district court dismissing the counterclaims —or dismissing holding such release counterclaim language unenforceable in the EEOC vs. U.S. Steel case.

So that basis of your ruling, which is why we made it, will in fact protect them regardless of what the Seventh Circuit does about the tender ratification issue.

THE COURT: Unless they disagree with that, too.

MR. GALLAND: Well, that's right.

THE COURT: Yes.

MR. GALLAND: The second response that I have to you is this: We understand that we will be telling class members [5] about the possible assertion of counterclaims. We don't want to hide that fact from them, we wouldn't hide that fact from them, but what makes a difference, and what made a difference in the Isaacs case, is that we want the Court to rule on this rather simple issue quickly.

It makes a difference to class members who are opting into this case and have to decide quickly whether in fact the district court at least has rejected these counterclaims. That's a fact that will make a difference to them. If these counterclaims are unresolved by the Court, that's something that is going to intimidate. If they are ruled on by the Court then we can tell them, sure, there is a chance that this will be reversed by the Seventh Circuit, I can give them my opinion of what the chances are that it will be reversed and they can make their decision based on the facts.

That leads me to my third point. The third reason why it is important for you to rule expeditiously on this is that this shouldn't have waited this long. The reason it waited this long is that the defendants at the start of this suit, instead of answering, at which point they would have had to assert their counterclaims, right back then with their answer under the compulsory counterclaim—instead of answering they filed what they styled a motion to dismiss.

Of course, it wasn't a motion to dismiss, your Honor. It depended on affidavits. It was a pure motion for [6] summary judgment and when you reached the motion you saw through that.

But they used that in order to delay until now the assertion of counterclaims, now when we're all mixed up with the motion to notify the class. For that reason,

Judge, what we have now is a motion that should have been decided many months ago. If they had filed the answer back when they should have we would have moved to dismiss the counterclaims and you surely would have ruled on that motion at the same time as you ruled on the ratification issue.

So those are the three reasons why, notwithstanding the fact that we can't guarantee the class that they won't be subjected to counterclaims, they ought to be decided and decided quickly.

THE COURT: Okay. Well, should we hear from Mr. Bulger on his position about the counterclaims?

MR. BULGER: I'll be short. Let me take those in inverse order. I attended some months ago a seminar given by the judges of this circuit on hardball litigation tactics, and I don't think we've been guilty of those. That's really what Mr. Galland is implying.

We did not style that motion as a motion to dismiss exclusively. It was styled as a motion to dismiss or in the alternative for summary judgment. We filed with that motion at the time we filed it a statement of undisputed facts and [7] affidavits.

Now, if you look at Rule 12, your Honor, you know perfectly well that we are entitled to file a 12(b)(6) motion with related documents and style it as a motion to dismiss, but that it will be treated by this Court as a motion for summary judgment, and the rule explicitly understands that. There's no fraud on the Court, and I very strenuously object to that characterization.

The fact is that we filed a motion we were entitled to file, which your Honor has certified for appeal. Obviously you've ruled against us but just as obviously there's room for dispute about that, and I think that's all that needs to be said.

So in terms of any delay, that hasn't been our fault. We have followed the rules precisely and we didn't attempt to present any fraud to the Court.

THE COURT: All right. Let's talk about the merits of his motion for summary judgment. Why shouldn't I dismiss it given what I've already ruled? And you're going to say, "Well, we—" I know you're going to say, "we admitted certain facts for purposes of our original motion to dismiss and/or—"

MR. BULGER: And we have new facts on this, but let me take that first of all. First of all, if Mr. Galland is correct and your Honor accepts in toto the Isaacs decision then you have to rule in favor of our counterclaim because the Isaacs [8] decision was predicated on counterclaims where the release did not have offensive language.

Our release does have that language and it has it in two places. That also leads into his other point that the release is invalid under the Older Workers. All the Older Workers Act says—and if you take a look at 29 U.S. Code 626, the first sentence says that—I'm paraphrasing, of course, because my memory isn't that good, but the first sentence says, "In order for a waiver to be considered knowing and voluntary," I think I'm pretty close on that, "it must meet the following criteria," and then it runs through that laundry list.

All the Older Workers discusses, all it discusses is the waiver issue, the waiver of the statutory right to sue for age discrimination. It does not discuss at all—at all—the contractual right to say, "Leave us alone or we get our money back."

Now, that is not precisely, and the counterclaims issue is not precisely what's up in the Seventh Circuit. What is up in the Seventh Circuit is our argument that you could ratify a release—and again I disagree with the Court's language, as you know—you can ratify a release even if arguably Older Workers hasn't been followed.

That doesn't discuss—and, by the way, your Honor, if we're going to get into a big discussion on the merits then I want to write about this because I think it's much clearer [9] when you take a look at the cases. But that's why I think that it's not decided.

With regard to expediting the motion there is one practical problem we have. We do believe that we have some factual material to submit to counter Mr. Galland's material. My problem is that Allied, as you may know, is in effect a type of association that's made up of its local agents, and they have—the best analogy I can come up with is, I've represented the American Bar Association and during the period of time just before and just after the annual convention that's really the whole job of the association, and Allied is somewhat similar—their convention comes up around October 10th-11th, and my people are very much out-of-pocket until later in October. So I would like to get at least—I'd prefer four but I'd like to get at least three wekes to respond to that motion, because I do believe we're going to have to submit an affidavit or two and it is very difficult to pull people when they're getting ready for this convention.

THE COURT: What are you going to say in your affidavits?

MR. BULGER: Well, I think that—and I think that we do have some conflict with some of the factual material that is contained and asserted in Mr. Galland's—and, quite frankly, I can't go into the detail of this, but we've looked at it and we have to explore and investigate some of that because we don't [10] think it accurate, but I can't say for sure it isn't.

MR. GALLAND: May I ask Mr. Bulger a question, Judge, which may help clarify this?

THE COURT: Um-hum.

MR. GALLAND: Our motion on the OWBPA is predicated on two facts we believe to be undisputed. One is one they proclaim in their brief itself, which is that our people got 21 days rather than—

THE COURT: 45.

MR. GALLAND: —45 days. Is that fact going to

(Addressing Mr. Bulger:)

be in dispute? Your own agreements say you have 21 days. Is that fact going to be in dispute, Mr. Bulger?

MR. BULGER: I think they may have actually—the agreements say that but I think they may have received more time. But, again, I am not prepared to say that it is. That's part of what we need to look at.

But let's say for purposes of what you're going to say next that my answer to that was no.

MR. GALLAND: All right. Fact number two is that our people were not given in writing the information on the cohorts of the people who were terminated and their ages and the cohorts of the people who were not terminated and their ages.

MR. BULGER: That's true; that's true.

MR. GALLAND: If that is true then everything else can be forgoten because they had to give them that or the releases [11] were not considered knowing and voluntary.

MR. BULGER: If that's the case and Mr. Galland will withdraw his submission and will resubmit it without all these other facts—

MR. GALLAND: It doesn't matter—

MR. BULGER: —then I can answer—well, wait a minute. Either we have—it's one or the other. It's not both.

If those are the only two facts that Mr. Galland thinks are critical, I'm willing to stipulate to those, and we can file a brief much more quickly. But what he has got is, he has got a statement of material facts, he has got affidavits attached, and I need time to defend that, your Honor.

MR. GALLAND: You know, your Honor, it's pretty clear what is going on here. First of all, going to Mr. Bulger's first point, we are told that Congress passes the Older Worker Benefit Protection Act and that a release may be totally invalid because he didn't follow the provisions of the act—

MR. BULGER: Pardon me, pardon me: But that a waiver—that the waiver provision may be invalid, not that the contract or that its other provisions—

MR. GALLAND: I understand. I understanding [*sic*] what your argument is.

His argument is—this is going to be the quality of argument that is presented to you on this counterclaim motion, Judge. Think of it. It's like a good news/bad news [12] joke, Judge.

> "The good news is that your release was worthless under this law. It's a waiver that doesn't pass muster.
>
> "But the bad news is that the employer can sue the hell out of you because you filed the lawsuit under a damage provision," and if Congress had that

kind of joke in mind when it passed this act I'll be a monkey's uncle. It's just, to use my favorite phrase, it's just goofy.

That is going to be their argument. That is not an argument that you are going to have to agonize over for very long, Judge. The notion that you can get around the OWBPA by suing for damage counterclaims, when the basic waivers on which the counterclaims are based are void, doesn't make any sense.

As to the undisputed facts, I have listed three of four facts which I believe to be undisputed. Number one, that this was a group termination program. I took that right out of the letter that these people wrote to the EEOC to explain their actions, which is Exhibit A to my motion, which says that they had a reduction in force in December 1990. As a result approximately 65 of Allied's 900 employees were terminated due to economic pressure. I believe that to be an undisputed fact.

My second undisputed fact was that they gave us 21 day[s], not 45. And my third undisputed fact was that they didn't give us the information that would have told us what the pattern [13] of these terminations was in writing.

If either one of those last two facts is undisputed, we win.

THE COURT: And if it was a group termination.

MR. GALLAND: And if it was a group termination. There is no dispuute that this was a group termination. The materials we get from these people at the EEOC show that something like 25 or 30 or 40 people were terminated the same day, and they say so in this letter.

MR. BULGER: Your Honor, I really don't want to belabor this because this was portrayed to me as an informal conference in chambers to discuss some of these scheduling issues—

THE COURT: Oh, I'm sorry—

MR. BULGER —but that—

THE COURT: Excuse me, Mr. Bulger. I'm sorry that was portrayed that way to you. The whole purpose of this thing was to try to see if I could rule on the motion for summary judgment from the bench, and if—

MR. BULGER: Well, in that case, your Honor, if that is what we want to talk about, I think that we need the time to write on this, because Mr. Galland is leaving an awful lot out here.

Let me just take you to a different scenario. I mean, he's got his Older Workers argument. We all agree, I think, that the purpose of—one of the major purposes of the [14] discrimination laws is to promote conciliation, and I think that promotes settlements, and it's been held by the supreme court numerous times, it's in Title VII, it's in the age act, and none of that language was ever repealed by Older Workers.

I think additionally, when we see the most recent civil rights act of '91, it says you ought to promote alternative dispute resolution, and I think it carries forward even more strongly the conciliatory purposes of the discrimination laws.

Now, think about this as a policy matter for a moment. And this is why I think it's going to be something that is an important issue:

I pay $15,000 to someone, whether my labor is good or not under Older Workers, but I pay $15,000 to them—

and this is why you ought to think about the counterclaims as something that are more than a toss-off here—and that person says to me, "Do you know what, Allied? I think that I've been discriminated against. I found out about it down the road. I don't think my waiver's any good. So I'm going to sue you. But I'm going to keep your money."

In that case if I'm Allied what am I going to do? I'm going to say, "Well, fine. The heck with you. Sue us."

But if someone that puts me in a position of, "You know, I think I was discriminated against, and I feel that so strongly, and so does my counsel, that that fifteen thousand dollars I paid you, I'm prepared to give it back to you"—[15] now, what do you do if you're Allied? What do you do if you're the plaintiff? If you're the plaintiff you're going to think long and hard before you tender that money back. I certainly would, for fifteen thousand dollars.

And if you're Allied, you're going to think long and hard as well. You're going to say, "If this guy thinks he's got a good claim and he's willing to pay us that money back, maybe there is something here. Maybe I ought to take another look at this. Maybe I ought to sit down with him and see if we can renegotiate our deal and pay some more money."

And if you want a good strong policy argument for why these counterclaims ought to be permitted, regardless of the fact that Mr. Galland is telling you Isaacs says one thing when he argued another—he argued that it's the absence of the offensive language which we have that means you don't get counterclaims—but if you think about that policy and the fact that none of the conciliatory requirements of these acts are overturned by Older Workers, in fact arguably it's just designed to help people know better how to conciliate, then you've got a pretty tough issue, I think, and the Court has to look at these kind of policy issues.

It seems to me that it's the sort of thing that the Court has to be careful about. The bottom line, though, of course, is that whatever the Court decides—I understand Mr. Galland's feeling, but I certainly don't think that the Court [16] should decide this based on their written papers and our oral argument.

THE COURT: What is your counterclaim for? Is it for a return of the fifteen thousand dollars—

MR. BULGER: It's for our money back.

MR. GALLAND: It's for more than that.

MR. BULGER: And for consequential damages.

THE COURT: Because I basically decided—I mean, I think I said in a sentence in there of course they're not giving the $15,000 away; it would be a setoff against any damages that these people realize, and if they realize no damages they would owe the fifteen thousand.

MR. BULGER: But we've also asked for consequential damages.

THE COURT: Pardon?

MR. BULGER: We've also asked for consequential damages. Our view is if this is invalid as a waiver, if it's statutorily invalid as a waiver the waiver provision may be out, but that the contract between the plaintiff, if you will, and Allied, still remains, and that we can sue for breach of that contract and for the consequential damages that flow from that breach, and that would include attorneys' fees.

THE COURT: Do you mean your argument is sort of, "Well, it doesn't work as a waiver but it's still a contract"?

MR. BULGER: Actually, I think it has to, your Honor. [17] If it isn't a waiver, don't you have to have the contract? I mean, did we pay money for nothing?

THE COURT: What is it if it's not—I mean, if it's not a waiver, what you're doing is saying, "Well, slice all the portions out where they waive their right to sue, and all that, under your ruling, Judge, even though we disagree with it"—

MR. BULGER: That's right.

THE COURT: "We still have the remainder parts of that agreement that are binding on"—

MR. BULGER: I think that's one way to put it but I think it's—it may even be an "even/or." If it's not a waiver then it has to be a contract where they owe us the money back, because they've taken money from us for nothing.

THE COURT: Well, I mean, I'm not—I don't know that I'm having a whole lot of trouble with your notion that they may owe you the money back, I didn't rule that they don't owe you the money back, I didn't rule that—I just said you have that available to you as a counterclaim. I said you have that as a setoff.

MR. BULGER: Setoff. Right. But that's different from a counterclaim.

THE COURT: What?

MR. BULGER: I mean—

THE COURT: Whether you call it a counterclaim, or whatever. Mr. Galland understands that they don't get the [18] $15,000 free of charge, that there may be a charge.

MR. GALLAND: Yes. You went further than all this, Judge. And let me just tell you in a word what's technically wrong with Mr. Bulger's attempt to preserve a right of counterclaim when he doesn't have the waivers themselves that are valid.

The waiver on which the counterclaim is based is the waiver of the right to sue. Congress didn't just call these "releases" in the Older Worker Benefit Protection Act; it used a broader term—waivers.

There were two waivers in that document that these people signed when they were terminated. One waives their rights under the ADEA but the other is a specific waiver of their right to file a lawsuit, and Mr. Bulger is saying that "because they filed a lawsuit we get these damages."

But the problem with that is that it is breach of that waiver on which the counterclaim, the purported counterclaim, is based. If the waiver is no good you can't get damages for breach of that no good waiver. And the waiver includes the waiver of the right to sue. That's why Congress called it a waiver.

THE COURT: Suppose I agree with you, Mr. Galland. What happens to his $15,000 hypothetical?

MR. GALLAND: What happens to his $15,000 is exactly this, and this is the same argument that was made under the tender ratification argument: An employer who pays money in [19] connection with an involuntary severance like this takes his chances. Either he gets a valid release for it, in which case he's got a valid release that will be a defense in this lawsuit, but if he doesn't follow the law then that money will—one of two things will happen to that money—either it will be a set-off if we win; if we don't win that money is gone. He will not get it back.

That's what you specifically held in your opinion.

THE COURT: Yes, that's what I held.

MR. GALLAND: So that the fact of the matter is that this is not a difficult issue. It ought to be decided now. There is simply no disputing that they did not comply with this act. You've rejected the one argument that they had to try and save these waivers, and you can't bill a damage counterclaim on breach of waivers that aren't valid. So that the counterclaims should be dismissed and should be dismissed now.

That will get us into a couple of issues about notice that I think you'll find easy to resolve.

MR. BULGER: Your Honor, if you read the Fortino decision in the Seventh Circuit, the Court points out the mass confusion that exists with regard to releases, waivers, whatever you call them, and it says, "You know, we've never figured out, nor have we ever been presented with, the issue of whether these things really fall into a waiver bin, a release bin or a contract bin, or into several bins," and I think that's really the answer [20] here.

Mr. Galland is telling you something, "Older Workers does this," but what the language of it is, it says—it applies to waivers; it does not say anything about counterclaims, it does not say a word about our getting our money back.

Now, I think that's all that we really need to add on this at this point. It's a different animal that we're talking about. We're not talking about a waiver, we're talking about a breach of contract.

Now, if Mr. Galland wants to say, you know, fine, this is up on appeal and it's an issue on appeal, and the Court is going to go along with that, I guess there's not much I can do. I—

THE COURT: Has the Seventh Circuit taken it, or do we know that?

MR. GALLAND: Here's what the status is in the Seventh Circuit: There are two proceedings up there. They took an appeal under the collateral order doctrine. The Seventh Circuit issued an order questioning whether it has jurisdiction under that doctrine. We have briefed in response to that order.

They also filed the 1292(b) petition after you certified it. That's been briefed. We're awaiting ruling from the Seventh Circuit.

THE COURT: Oh.

MR. BULGER: What they've done is, they have stayed [21] all proceedings while they—and they've consolidated them—while they consider the two appeals.

THE COURT: Okay.

MR. GALLAND: Have they done that? I haven't gotten an order to that effect.

MR. BULGER: Yes. They did that, I believe Monday, is my understanding.

THE COURT: All right.

MR. BULGER: We have also got—

THE COURT: Go back, Mr. Bulger, though. I'm having conceptually a—maybe it's just that you've thought about it more than I have or you're brighter than I am,

but I can't understand how Congress can say this thing cannot operate as a waiver unless you comply with certain requirements, and then you come up with the argument that "Well, even though we didn't comply with it, and therefore, even though it's not a waiver," still there are left in the contract certain agreements between the parties which remain enforceable."

MR. BULGER: That's exactly correct, Your Honor, and I think that what Congress is saying in the Older Workers—look, Mr. Galland and I completely disagree, there's no doubt about it, and I'll be happy to give this to you in greater detail, but what Congress said is,"You can't waive your right to sue," that's it, "unless you meet these criteria."

It didn't say a word, not one word, about the [22] employer doesn't deserve to have his money back under ordinary state contract principles, that if you break your word, you got to pay back. It didn't say a word about that.

In fact, I read that legislative history cover to cover and I can't find a word about it in there, including Mr. Galland's testimony, and I think if you're going to take a look at this it really needs to be done with a more careful look than this.

THE COURT: But what you're doing, your argument is is running into the same thing I talked about in my opinion—if I buy this argument I undercut the whole purpose of—I mean, one of the ways we determine what they mean in a statute is to look at its purpose. If we can't figure it out from its words, let's take a look at its purpose.

Its purpose can't be to put somebody in this kind of an impossible position, because it would shift everything to the benefit of the person who didn't comply with the act. It would give money to people who are unemployed, who are going to spend it to live, and then say to them, "Well, you can still sue because they didn't live up to the statute. But you've got to give the money back."

MR. BULGER: Well, let me make a couple of responses to that. Number one, the Court has to of course give effect to all the parts of the statute, including the parts about conciliation that still exist—

[23] THE COURT: Yes, but if you don't—

MR. BULGER: Number two—

THE COURT: Let me stop you a moment. That argument persuades me of nothing because—

MR. BULGER: Okay. All right.

THE COURT: There is nothing inconsistent in what I am saying about sure, this is designed—

MR. BULGER: You're saying this is a hard choice and that it's a benefit to the employer. And if you look at the U.S. vs. Sampson case in the supreme court, it's a case on preliminary injunction, and it takes a look at irreparable injury, and, when you think about it, really it is a little bit of what you're talking about, and what it says about irreparable injury is that no matter how severe the financial strains on someone, that's not enough to prove irreparable injury.

It comes up over and over in the Title VII and in the employment context that people come in and say, "I've been retaliated against. I've had my pay cut off. I've been discharged. And I've been placed in an absolutely impossible position. And in addition to the financial strain it has caused me emotional distress and trouble with my family," and all these other things, and there are certainly a couple of cases that go the other way, but, your Honor, the enormous weight of the authority under Sampson is that that's not irreparable harm.

It seems to me that is very analogous to what you [24] are talking about, your Honor.

MR. GALLAND: It seems to me that the real question—the only question that you have to ask yourself in this case is as the Court phrased it, did Congress really intend that what it gave with one hand could be taken away with the other in this fashion? Of course it couldn't.

Besides, conceptually it doesn't make any sense. The

whole premise on which this counterclaim is structured is the alleged promise to waive the right to sue. That's the promise on which the counterclaim is predicated. That's the agreement on which the counterclaim is predicated.

What Congress said is that that agreement, that waiver, is no good. If the agreement is no good, as a matter of simple, ordinary contract law, you can't sue somebody for breach of an invalid promise. That takes care of it.

But even without that problem, even if the Older Worker Benefit Protection Act had never been passed this counterclaim would have to be dismissed.

Mr. Bulger describes what I argued in Isaacs. He wasn't there. He may not know that what I argued in Isaacs was two different things. Number one, I said, "Look, these releases in Isaacs are just defensive releases. They don't contain a promise not to sue. They don't claim any damage provisions or anything like that," I did argue that, but I made another argument in the alternative, an absolutely in-the-alterna-[25]tive argument to Judge Mihm, and that alternative argument was it wouldn't matter even if these weren't defensive releases and even if there were provisions in here that said "you have to give the money back," and it wouldn't matter even if Illinois recognized a damage cause of action when you breach a defensive release—I said, "That wouldn't matter, Judge, because that would be inconsistent with the purposes of the ADEA, to imply that damage cause of action and that damage counterclaim."

Why? Because it would deter people from bringing good faith challenges to the validity of their releases. Judge Mihm said, "I not only agree with you, Mr. Galland, on the defensive release argument, I agree with you on this alternate argument, too," and he put that agreement in writing in the part that I quote in my brief here.

He had precedent for it because the EEOC had attacked a release which reads almost as if Mr. Bulger's client wrote it. The EEOC had brought a lawsuit to attack that private provision which says that "if you sue

you've got to give us the money back and your benefits go back down, and you owe us attorneys' fees."

The EEOC brought a lawsuit in Pennsylvania called EEOC vs. United States Steel Corporation way before the OWBPA was passed attacking that provision and saying, "Judge, enjoin it, find it invalid, because it is contrary to the purposes of the ADEA and is unenforceable," and the district [26] court in Pennsylvania said, "That's right, it is," and he stated his reasoning in writing in the passage that I've quoted in my brief.

So the long and the short of it is that these counterclaims were no good even before the OWBPA was passed under Judge Mihm's alternative ground and under EEOC vs. U.S. Steel, but after Congress passed this statute, whose purpose was to prevent abuses and to require disclosure in connection with the obtaining of waivers, this counterclaim is a dream.

MR. BULGER: But how do you square that, your Honor, with the cases at the same time as this case that said you do have to pay back? I mean, I don't think you can.

MR. GALLAND: Because what you do is, you understand there's a dispute about that ratification, tender ratification; Judge Plunkett has come down right on our side of that issue and we'll wait to see what the Seventh Circuit says.

Those cases, by the way, came before the OWBPA—

THE COURT: Yes. I dealt with those cases, Mr. Bulger.

MR. BULGER: Well, I still think we're entitled to an opportunity to write on this, your Honor. I don't know, I mean, basically Mr. Galland and I disagree, that's pretty clear. We are also perhaps putting the cart before the horse because we have another issue with regard to the notice which needs to be explored, which is whether or not these are even appropriate class representatives.

[27] Now, the Anderson vs. Montgomery Ward's case in the Seventh Circuit says you can piggy-back on the

claims of class representatives even though you didn't file a charge, and what that case says, though, is that "provided the claims are brought as class claims," and that the employer is placed on notice and so forth.

I've got the charges with me, and there are subsequent cases, I've got a Sievertsen case from the District Court of Minnesota, which says in essence, "If they don't say 'this is a class claim' in the charge, it's not, and therefore there is no piggy-backing."

I have the charges with me. I'd be happy to give them to you. You have them, of course, in your file. They are all phrased in the first person singular. They aren't even appropriate charges for piggy-backing and therefore I don't think there should even be a notice sent out in this case anyway, which would moot this whole summary judgment issue on the counter—well, perhaps not as to the individual plaintiffs, but at least with regard to the impact on the notice it would moot it.

MR. GALLAND: Yes, but, you see, there are going to be two arguments that are going to be made with respect to the notice, and one of the reasons I wanted this conference was to let you know about these two disputes that we have.

Mr. Bulger is going to argue that the charges [28] that were filed by the individual plaintiffs are not sufficient to support opt-ins, that they're not sufficient to support piggy-backs, and we have a whole series of arguments and cases that we're ready to show to the contrary.

We're going to show, for example, that the EEOC investigated this matter, that they investigated in fact the pattern of—or information about class members, and we're going to show that they're perfectly adequate charges, when you reach that issue.

There is also going to be an argument—

MR. BULGER: But if I may interject just at this point, the whole press for expedited summary judgment is to get the notice out, and Mr. Galland has just said "when you get to that issue." It seems to me that what

I said is correct, that the first issue that needs to be dealt with is whether or not this is even an appropriate case for notice, and that there is no need for expedition of the counterclaim issue.

MR. GALLAND: Well, I'm going to reach that, if I may finish.

There's also going to be an argument made by Mr. Bulger that the people who opt in are not similarly situated and therefore shouldn't be in this class action. We're ready for those arguments and they will come.

But the issue is, should the Court try and determine these issues before notice goes out when we're approach-[29]ing a two-years limitations—possible two-year limitations cutoff, or should it do it after we see whether anybody opts in.

We already have the answer to that question. Every case that I have been involved in, including two cases in this district, has held, "Let's get the notice out, get the people the opportunity to opt in before any potential statute of limitations expires"; if no one opts in, which of course could happen, then we don't even have these arguments. They never come up. The Court doesn't have to do all the work of deciding these things because nobody will have opted in and the Court saved itself a lot of work and so did we.

If people opt in then we have real live bodies with real live claims that the Court can apply these arguments that are going to be made by the defendant to. For example, if we try and decide before people opt in whether their claims are similarly situated or whether they fall within the scope of the notice, you're taking an abstract class of thirty-five or forty people potentially and trying to determine whether all those claims abstractly fall within the scope of this charge or whether the EEOC investigated them, and all the issues that come up, or whether they're similarly situated to plaintiffs, whereas, if we do it afterwards, we have a discrete group of people who say that they want to be in the case, and then what

you do is you take those people and you have real claims with real hard facts that you can put beside the named plaintiffs' claims and [30] decide whether they're similarly situated.

Now, what the Court did in—

MR. BULGER: If I could interject before we start again briefing orally, since these cases I see up here—I see they are essentially pre-Anderson vs. Montgomery Ward, and if I read Anderson vs Montgomery Ward in the way that Mr. Galland has argued his other cases, then the statute of limitations is irrelevant. If they're entitled to piggy-back, they can piggy-back. So I think that's a facetious argument.

MR. GALLAND: Well, let me ask you this, Mr. Bulger, because you've been very cagey about this so far—

MR. BULGER: Thank you.

MR. GALLAND: —Does Allied concede that no statute of limitations will expire? Do you waive your right, Mr. Bulger, to assert that the statute of limitations as to class members expires two years from the date they were notified of their termination?

Yes or no.

MR. BULGER: I don't think I have to respond to that kind of a question, Mr. Galland, unless you're going to brief it and provide me with these cases.

But why should I concede that, your Honor? He's asking me—I'm the defendant. I didn't bring this lawsuit. I didn't wait until I received every payment and then wait longer and file EEOC charges, and then wait longer and file my [31] action only in November-December of 1991, when I was laid off a year prior. We aren't the ones who waited. When we came in to court we filed our motion in a timely fashion.

We have done everything—you haven't seen us here asking for extensions of time left and right. That has not happened. It's not my fault if Mr. Galland's plaintiffs

waited, and now he's trying to do the old trick bag procedure of "well, let's have you concede this."

I don't have to concede these things. I'm entitled to defend my case. I'm entitled to raise my defenses. If Mr. Galland has been untimely, that's his problem.

But, by the same token, I find it very cagey of Mr. Galland that even though in his prior cases he's argued that there is no statute of limitations, that therefore I should concede it. I don't think that's appropriate.

MR. GALLAND: Judge, the sub silencio answer was, "No, I won't concede it." Mr. Bulger is saying there's nothing to worry about about the statute of limitations, but he's saying, "I won't waive my right to argue that there is," and to protect the class members we've got to get them in here before two years are up.

MR. BULGER: Your Honor—

MR. GALLAND: If Mr. Bulger won't waive his right to argue that—and we filed this lawsuit a year ago, we haven't waited, we've been—

[32] MR. BULGER: I'll give him a notice today; I'll give him a notice today.

MR. GALLAND: No, sir—

MR. BULGER: The notice today says that we have counterclaims that remain to be decided.

MR. GALLAND: Oh, and who's going to file—

MR. BULGER: This is what's happening, your Honor. Mr. Galland knows that if he can pooh-pooh the fact that there are counterclaims that he can perhaps get a larger class, create more pressure, engage in more discovery and expend more money.

Remember, we're people who have releases. We may disagree about their validity. There's no question, we don't want that. I don't disagree with that. But I'm prepared to give a truly neutral and to let these things sort themselves out later.

Mr. Galland wants expedition. I'll give him more expedition than he can handle. Let's send out a notice that is truly neutral. It says, "Here are the claims :——.

But here are the claims the company has: ———," and, "You may win or you may lose."

That's all I'm asking. We'll send that out today and preserve our rights to argue whether or not people should opt in. I'm willing to do that. I don't think Mr. Galland is willing to do that.

MR. GALLAND: Well, you know, your Honor, this is [33] exactly what Caterpillar told Judge Mihm it was willing to do. Caterpillar said, "Let's send out the notice. We'll tell them we've got counterclaims," and Judge Mihm said, "Uh-uh. I don't think these counterclaims look"—"they look fishy. I'm going to consider the counterclaims issue. We're going to dispose of that on an expedited basis," which is what he did, "and then we're going to send out the notice."

We sent out the notice in Caterpillar to 720 people. Far from encouraging them to come into the case, we sat down with each and every one of those people who contacted us and only 35 people in that class came into the case.

We don't want worthless claims in this case. We want people who come in, if they want to come in, who have good claims, but we don't want them intimidated by the fact that there is an unresolved counterclaim issue "and I've got to make up my mind by December 3d"—who is going to take that chance?

Judge Mihm saw through this tactic and he said, "No. We'll dispose of these counterclaims issues expeditiously," and he did, he dismissed them, and when people contacted us we said, "Look, Caterpillar asserted counterclaims against these people. Judge Mihm dismissed them. That may be appealed somewhere down the line. In our opinion it will hold up. You're informed." That's what we'll do with these people.

But to tell people who are considering, who have to make up their minds to opt in by December 3d, that there is [34] an unresolved counterclaim out there against them that might lead to paying Katten-Muchin's attorneys fees,

holy smokes! That makes the fifteen thousand or ten thousand bucks look like peanuts. These guys may be asked to pay the attorneys' fees of one of the highest priced firms in Chicago.

MR. BULGER: But you're going to have to say that anyway, your Honor. If it's on appeal you're still going to have to say that.

THE COURT: Yes, you would still have to say that.

MR. GALLAND: Well, we'll tell people what—

MR. BULGER: And, you know, as I said, I think fair is fair, your Honor. Hoffman LaRoche says the Court has to be neutral about this. Now, he puts it as intimidation. I think that your Honor thinks there is enough question here that you certified this matter for interlocutory appeal, and there really needs to be no more said.

THE COURT: Well, Mr. Bulger, the fact of the matter is I'm rather—not that it means much, but I think I'm right. It's not that I think there is a huge question. The real reason I certified it for appeal is there's no help in the appellate courts, it's new—

MR. BULGER: And it's a case of first impression.

THE COURT: It's first impression.

MR. BULGER: Right.

THE COURT: And it's important in this case. It's [35] critical in this case. But I don't—I mean, I think I'm right or I wouldn't have decided the way I did.

MR. BULGER: No, I knew that, your Honor, and you know that it wasn't the position we took that we had to show you were wrong, but we've all been reversed by the Seventh Circuit, I have certainly and I'm sure Mr. Galland has—

MR. GALLAND: Who? Me?

MR. BULGER: Well, perhaps not, George. I know you're a wonderful attorney.

MR. GALLAND: Thanks.

MR. BULGER: But I have, and—

THE COURT: Well, I have.

MR. BULGER: And I've lost cases, too, I'll put that on the record, and I may lose this one some day, but the bottom line is the Supreme Court has said the Court has to be neutral in notifying these people.

We do have defenses, your Honor, and we think we have got good ones. Mr. Galland disagrees. But if he is asking for expedition and he's worried about his statute of limitations, I have offered the way out, and I really don't know what more needs to be said.

MR. GALLAND: I agree with Mr. Bulger, Judge. We're done. Just to recap what I want, the actions that I hope the Court will take today are: I would hope that the Court would dismiss these counterclaims. I would hope that the Court would [36] order that notice go out to the class, and that questions about—because of the shortage of time, that questions about whether the people who opt in can appropriately stay in the case or should not stay in the case will be postponed until we see whether anybody opts in, at which point we encourage Mr. Bulger to bring any motion he wants, whether with respect to charges, with respect to similarly situated, and that we can determine that expeditiously, but no one will then run the risk of losing his claim to the statute of limitations argument, which Mr. Bulger wants to reserve.

THE COURT: Mr. Bulger, my best judgment is that the counterclaim ought to be dismissed. I'm going to dismiss it. I think the reading of this act and what I decided mandates it. I read this as there's no dispute about the group dismissal, that it was not 45 days, and that they weren't told all the things required by 26(h), and with that I think it's a defective, void document, and I don't think there's any justification for saying parts of it remain as possible counterclaims, with the exception of the fact that the fifteen thousand dollars is a setoff against winning.

That's where I am. So I say it's dismissed. The notices can go out after they are explained, after all of this is explained to the class, because it has to be made clear

to them that this is a district court decision on two rather critical issues that's subject to review and that nobody can [37] predict on things where there are not express rulings on this exactly what the court of appeals will do with it.

MR. BULGER: In other words, your Honor, that even though the counterclaims may be dismissed, that they may also be reactivated?

THE COURT: I can't say they won't be reactivated. I'm not going to reactivate them, but the Seventh Circuit—

MR. BULGER: But the notice needs to be—

THE COURT: If the Seventh Circuit, for example, takes the 1292(b) action and decides I'm wrong on that, of course that's the end of the case, isn't it?

MR. BULGER: Yes.

THE COURT: The case is over.

MR. BULGER: Yes.

THE COURT: If I'm affirmed on that, the case goes on, we still don't know whether I'm right in this action I've taken today. They had better be told all those things.

MR. BULGER: May I ask the Court's indulgence, because we've got already a pretty complicated procedural posture in the Seventh Circuit; if your Honor is going to issue a written order on this or just rule from the bench, in either event I would ask that—and, again, I'm not trying to put words in your Honor's mouth, but I gather that this decision flows from the decision the Court has already reached, and rather than piecemeal appeals—

[38] THE COURT: Oh, only in part; only in part. I mean, it—because you have an argument that you've made, "Well, even if it's an invalid—even if it doesn't work as a waiver, it still works as a contract," you've still got that argument, which I'm rejecting, but that's not the same thing as I decided that went up.

MR. BULGER: All right. In that case, your Honor—

THE COURT: And, no, Mr. Bulger, I'm not going to certify this thing to go up. The Seventh Circuit will—I've got enough trouble upstairs. I'm not going to do that, too.

MR. BULGER: Well, I think, your Honor, if you would simply say that it would make sense to consolidate all this, that that probably is the best way to handle it.

THE COURT: No. That's up to the Seventh Circuit. If you want to try another collateral appeal on this, go ahead, but I'm not going to aid you in this one.

MR BULGER: Don't take it personally, though, Judge.

THE COURT: No, no. I don't, I don't. I understand that you've got a job to do. But I just don't think this is an appropriate thing—I think this has less chance of being accepted on appeal than any of the others because this is a—well, I'm not going to get into it. It's just not worth talking about.

Go ahead and do your—are you going to have to work with Mr. Bulger on the notice?

MR. GALLAND: Yes. This clarifies a couple of things. [39] We'll sit down, Judge, and we will try and draft notice language that takes account of your ruling. I'll tell the Court that I intend to say in the notice—I wish I didn't have to but the Court says I do, so I will—I will say in the notice that the Court—I'll tell them about the tender ratification ruling, I'll tell them the District Court has rejected it, and that as of the notice if the court of appeals hasn't ruled that the defendant is attempting to appeal this and may well appeal it at some point down the line even if it doesn't appeal it now.

I'll tell them that the Court has dismissed the counterclaims and that the defendant has the right to appeal that ruling at some point or at the end of the case.

THE COURT: Well, or to try now.

MR. BULGER: And that they may be required at some point to pay this money back.

MR. GALLAND: Well, I'm going to tell them what the claim is, I'm going to tell them that the district court has dismissed it, and that they have the right to appeal it, and that's all, it seems to me—

THE COURT: Well, and you should say that, although I've dismissed it, what that claim is saying is—

MR. BULGER [*sic*; should be GALLAND]: I'll tell them what they're asking for.

THE COURT: Right. Absolutely.

MR. BULGER: Right, the money back and the consequential damages.

[40] THE COURT: Right. That's what they're claiming, and I've said I'm not going to allow it but that I'm hardly the last word on these things.

MR. GALLAND: I understand. We will work the language that embodies that.

THE COURT: All right.

MR. GALLAND: We'll bring it to you, if we can—if we agree on it we'll inform the Court of that. Did you want to set a status for us to—

THE COURT: No, I'm not going to set another one. If you have a problem with it, call Terry and we'll arrange a meeting and—

MR. BULGER: Your Honor, just so again my record is clear, you are granting the plaintiffs' motion for summary judgment as to these counterclaims—

THE COURT: For summary judgment to dismiss the counterclaims.

MR. BULGER: —as to these counterclaims—

THE COURT: Right.

MR. BULGER: And that from your perspective that takes them completely out of the case at this level?

THE COURT: Yes.

MR. BULGER: All right. Thank you, your Honor.

THE COURT: Okay. Would you do one thing for me, Mr. Bulger: We've still got this NFC motion—

[41] MR. BULGER: It's fully briefed, I believe.

THE COURT: I don't think it is.

MR. KENDE: We haven't had it responded to yet.

MR. BULGER: It's fully briefed from our side.

MR. KENDE: Yes; we were told we would be able to do some discovery regarding—

MR. BULGER: Well, there was one remaining thing. Your Honor suggested, and we agreed, to present the president of NFC or the entity that is NFC—

THE COURT: Right.

MR. BULGER: —and that they would take one deposition limited to the issues of that motion, and we're still prepared to do that.

THE COURT: Right, but what I'm going to ask you to do is—I've been doing so much work on this case. Could you withdraw this and refile it at some later date? It's hardly—it's not a matter of much importance.

MR. BULGER: No, it isn't. If it is without prejudice and—

THE COURT: Of course.

MR. BULGER: —and if Mr. Galland agrees that we aren't going to spend enormous amounts of time on the issue, certainly.

THE COURT: Right. Okay. Do that then. Then I don't have to—because otherwise it's going to be on my 6-months [42] list under the Biden bill, and it's not fair that that should happen. I've been doing other things on this case.

MR. BULGER: I agree. Sure.

THE COURT: And my sense of it is, it's not very important. It's going to determine—it's important to NFC, I suppose, but, I mean, it's not something we have to address actually until right before we go to trial. It affects discovery not a whit—does it?—except for—

MR. BULGER: I don"t think so.

THE COURT: You're representing both of them anyway.

MR. BULGER: I mean, your Honor, my position is I'll do my job, and I can be persistent, but I don't see any need to clog up the Court's calendar.

THE COURT: Okay. Great. Then we'll just dismiss it without—or you'll withdraw it; it's without prejudice; you will refile it at an appropriate time, hopefully toward the end of discovery, when we deal with the pretrial order and motions in limine.

It's really a motion in limine. I could deal with it that way.

MR. BULGER: Fine. You're sure I can't convince you to change your mind on the certification?

THE COURT: No. Not on this one.

MR. BULGER: I said I'm persistent.

THE COURT: I've already stuck my neck out for you, [43] Bulger, on the 1292(b). I mean, I did it because I think it's right. But I'll lose credibility up there if I start writing "1292(b)" on the bottom of every one of my orders. I think you're better off without it, frankly, but you've still got a right to try.

MR. GALLAND: Judge, this will be a final—this will be a judgment, I suppose, on the counterclaims. Do you want us to submit a proposed form of order?

THE COURT: Yes. You had better do that.

MR. GALLAND: All right.

THE COURT: Thanks a lot, gentlemen.

MR. BULGER: Good morning, Your Honor. Thank you for all the time.

MR. GALLAND: Yes. Thank you, Judge.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 10, 1994

HON. JOEL M. FLAUM, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. JOHN W. REYNOLDS, District Judge *

No. 92-3472

GERALD OBERG, NICHOLAS TAUTZ and STEVEN ADAMS,
on behalf of themselves and persons similarly situated,
Plaintiffs-Appellees,

v.

ALLIED VAN LINES, INCORPORATED
and NFC CONSORTIUM,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 91 C 6576—Paul E. Plunkett, Judge

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* The Honorable John W. Reynolds, District Judge of the Eastern District of Wisconsin, sitting by designation.

No. 92-3893

GERALD OBERG, NICHOLAS TAUTZ and STEVEN ADAMS,
on behalf of themselves and persons similarly situated,
Plaintiffs-Appellees,

v.

ALLIED VAN LINES, INCORPORATED,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 C 6576—Paul E. Plunkett, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on December 7, 1993, by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 2, 1992

Before HON. RICHARD A. POSNER, *Circuit Judge*
HON. JOEL M. FLAUM, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*

No. 92-8050

ALLIED VAN LINES, INCORPORATED, and
NFC CONSORTIUM,
Petitioners,

v.

GERALD OBERG, NICHOLAS TAUTZ and STEVEN ADAMS,
on behalf of themselves and persons similarly situated,
Respondents.

Petition for Permission to Appeal under
28 U.S.C. § 1292(b) United States Court for the
Northern District of Illinois, Eastern Division

No. 91 C 6576—Paul E. Plunkett, Judge

This matter comes before the court for its consideration of the following:

1) "PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b)" filed September 4, 1992 by counsel for the petitioners.

2) "PLAINTIFFS ANSWER IN OPPOSITION TO PETITION FOR INTERLOCUTORY APPEAL" filed September 10, 1992 by counsel for the respondents.

On consideration thereof,

IT IS ORDERED that the "PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b)" is GRANTED. Pursuant to Federal Rule of Appellate Procedure 5(d) the petitioner shall pay the required docketing fee to the clerk of the district court within 10 days of the date of this order. Once the clerk of the district court notifies the clerk of this court of the payment of the docketing fee the clerk of this court will enter the appeal on the courts docket. See Federal Rule of Appellate Procedure 5(d).

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

November 20, 1992

Before HON. RICHARD A. POSNER, *Circuit Judge*
HON. JOEL M. FLAUM, *Circuit Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*

No. 92-8061

ALLIED VAN LINES, INCORPORATED, and
NFC CONSORTIUM,
Petitioners,

v.

GERALD OBERG, NICHOLAS TAUTZ, and STEVEN ADAMS,
on behalf of themselves and persons similarly situated,
Respondents.

Original Petition for Permission to Appeal Under
28 U.S.C. 1292(b) Northern District of Illinois

No. 91 C 6576—Eastern Division
Paul E. Plunkett, Judge

This matter comes before the court for its consideration of the following documents:

1. "PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b)" filed herein on

November 2, 1992, by counsel for petitioner Allied Van Lines, Inc.

2. "PLAINTIFFS' ANSWER TO PETITION FOR LEAVE TO APPEAL" filed herein on November 12, 1992, by counsel for the respondents.

On consideration thereof,

IT IS ORDERED that the PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b) is GRANTED.

Pursuant to Federal Rule of Appellate Procedure 5(d), the petitioner shall pay the required docketing fee to the clerk of the district court within ten days of the date of this order. Once the clerk of the district court notifies the clerk of this court of the payment of the docketing fee, the clerk of this court will enter the appeal on the court's docket. *See* Fed.R.App.P. 5(d). Additionally, the court on its own motion, ORDERS that this appeal, once docketed, be CONSOLIDATED with Appeal No. 92-3472.

APPENDIX H

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1743

ALLEN M. WAMSLEY, DONALD J. WHITTENBERG, ANTHONY J. NAGY, BETTY R. SANDERSON and GLENDA K. BENNETT,
Plaintiffs-Appellants,

v.

CHAMPLIN REFINING AND CHEMICALS, INC., *et al.*,
Defendants,

CHAMPLIN REFINING AND CHEMICALS, INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Dec. 30, 1993

Robert Edward Goodman, Jr., Fults, Francis & Goodman, Dallas, TX, for plaintiffs-appellants.

Susan L.P. Starr, EEOC, Washington, DC, for amicus curiae EEOC.

Stanley Weiner, Janet A. Hendrick, Jones, Day, Reavis & Pogue, Dallas, TX, for Champlin, Citgo and Termination Pay Plan.

Ann Elizabeth Reesman, McGuiness & Williams, Washington, DC, for amicus curiae EEAC.

James Baird, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, IL, for amicus curiae NPELRA.

Before JONES and DeMOSS, Circuit Judges, and BARBOUR, District Judge [1].

DeMOSS, Circuit Judge:

We are called upon in this case to determine whether the waiver requirements of the Older Workers Benefit Protection Act [2] (the "OWBPA"), make our holding in *Grillet v. Sears Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991), unsound. Because we conclude that nothing in the text or the legislative history of the OWBPA evidences a congressional intent to disturb the common law principles to which our holding in *Grillet* is anchored, the district court's judgment is affirmed.

BACKGROUND

Appellants are former employees of Champlin Refining & Chemicals, Incorporated ("Champlin") or one of its predecessors-in-interest. In September of 1990, Champlin informed its Irving, Texas office employees that at the end of the year Champlin would become a wholly owned subsidiary of Citgo Petroleum Corporation. Champlin explained that as a result, the Irving office was to be closed and several of its employees were going to lose their jobs. Champlin also explained that it was initiating a "Termination Pay Plan" (the "Plan") for the benefit of those employees whose employment would be terminated. In October, Champlin circulated a copy of the Plan to all of its employees, including Appellants.

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[1] Chief Judge of the Southern District of Mississippi, sitting by designation.

[2] Pub.L. No. 101-433, § 201, 104 Stat. 983 (1990) (amending the Age Discrimination in Employment Act at 29 U.S.C.A. § 626(f) (West Supp. 1993)).

In November and December, Champlin informed Appellants that they were among the employees who were going to be "let go." Champlin provided them with a "Notice Pertaining to Release of Claims" document and a "Release of Claims" agreement.[3] The notice included the following provision:

> Although you may execute the Release of Claims as soon as you wish, you also may take up to 45 days from your receipt of the Release of Claims to consider it. Your decision to execute the Release of Claims and accept benefits under the Termination Pay Plan will be revocable for seven days after execution, and no payment of termination pay will be made until that period has expired. Therefore, to be able to provide your termination pay to you not later than five business days after the termination of your employment, the Company must receive your executed Release of Claims at least seven days before that payment date.

The release provided for Appellants' waiver of any action or claim against Champlin and "its successors, assigns, [and] affiliates," "relating to or arising out of [their] employment with [Champlin] . . . or the termination of such employment, including but not limited to, claims for . . . age discrimination under . . . the Age Discrimination in Employment Act of 1967." The release made clear that the benefits to be paid under the Plan constituted the consideration for the release.

Each of the appellants executed a release, and in return, Champlin paid Appellants severance benefits.[4] It is

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[3] On November 7, Wamsley received the notice and release and was informed that he would be terminated on November 30; on November 15, Nagy received the notice and release and was told that his termination date was also on the 30th; on November 20, Whittenberg, Bennett, and Sanderson received the notice and release and were informed that their employment would be terminatd on December 31.

[4] Wamsley executed on November 20 and received $84,369.13; Nagy executed on November 21 and received $90,763.01; Sanderson

undisputed that Appellants would not have otherwise been entitled to receive these benefits; such benefits were paid strictly as consideration for their release of Champlin.

In April of 1991, Wamsley, Whittenberg, Nagy, and Sanderson sent Champlin a letter threatening suit under the ADEA.[5] Later that year, in May, each of the aforementioned appellants filed charges against Champlin for age discrimination with the Equal Employment Opportunity Commission.[6] In January of 1992, their releases notwithstanding, Appellants filed suit against Champlin, Citgo and the Plan (collectively referred to as "Champlin") alleging that it had unlawfully discriminated against them on the basis of age when it terminated their employment and denied them certain benefits under the Plan.

They also alleged that their releases were "void or voidable" due to duress and Champlin's failure to comply with one of the conditions of the OWBPA. Appellants contended that Champlin had failed to provide them 45 days to consider the release as required under the OWBPA, and thus, the releases were not "knowing and voluntary" within the meaning of the section 626(f)(1) of the ADEA.

Champlin answered the suit with a motion to dismiss. It argued that the releases were valid under the OWBPA and relied on the above-quoted portion of the notice document as proof that Champlin had provided its employees the 45-day consideration period. It also tendered affidavits

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executed on November 27 and received $25,634.99; Bennett executed on December 19 and received $28,442.80; and Whittenberg executed on December 21 and received $54,000.00. In addition to cash, appellants received other benefits including out-placement services through 1991 and medical, dental and life insurance benefits for a period of six months.

[5] Apparently Bennett had not thrown in with the other would-be-litigants at this time.

[6] Bennett filed her claim with the EEOC on December 30, 1991.

specifically denying that Appellants were told to execute and return the release prior to the expiration of the 45-day period. Champlin explained that it had simply told its employees that they could avoid an interruption in payroll if they returned the executed releases before their termination date.

Champlin also averred that Appellants had not returned or offered to return the severance benefits they received as consideration for the releases. Thus, Champlin argued that even if the court was unable to determine as a matter of law that Champlin had provided the 45-day consideration period, the court should hold that Appellants had ratified the releases and dismiss their claims.

Appellants responded to Champlin's motion and proof by tendering affidavits in which each swore to facts surrounding their termination and execution of the release. Appellants claimed to have been told by certain individuals in the Champlin organization that they had to sign and return the release by their termination date, less than 45 days after receiving the notice, in order to receive benefits under the Plan.

On August 14, 1992, the district court granted Champlin judgment and dismissed Appellants' suit. The court held that the releases were knowing and voluntary within the meaning of the ADEA and, thus, barred Appellants' suit. The court alternatively held that even if the releases were not valid when executed, Appellants had ratified the agreements by failing to return to Champlin the benefits they had received as consideration after learning of the releases' alleged invalidity.

Appellants appeal, raising two general contentions. They argue first, that fact issues exist regarding the knowing and voluntary nature of their releases. They also contend that the doctrine of ratification has no application in this suit. Although we agree with Appellants' first contention, we reject their second. The district court's judgment is, therefore, affirmed.

DISCUSSION

Knowing and Voluntary Waiver

Congress, through enactment of the OWBPA, has determined that employers must afford their employees the right to consider for 45 days whether they should waive any rights or claims *vis á vis* the ADEA in exchange for benefits under a group termination program. 29 U.S.C. § 626(f)(1)(F)(ii). Appellants contend, *inter alia*, that Champlin denied them this right. Champlin responds by arguing that it complied with the 45-day requirement and pointing to the "Notice Pertaining to Release of Claims" document as proof. Appellants counter by swearing that the information contained therein was orally countermanded by certain persons at Champlin. Champlin, of course, denies that Appellants were told anything of the sort.

Which version accurately describes Champlin's dealings with Appellants is an issue that cannot be resolved by the court through summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-55, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). We are unable to conclude, therefore, that Appellants' releases were "knowing and voluntary" under the OWBPA. Although we recognize that Appellants have managed to create a fact issue on this point, we consider the issue to be immaterial in light of our conclusion that Appellants have ratified their releases as a matter of law.

Ratification of the Releases

Appellants do not dispute that they have neither returned nor offered to return the benefits they received as consideration for the releases. Rather, Appellants argue that the law does not require them to make such a tender in order to pursue claims under the ADEA. In taking this position, Appellants press two arguments. They first contend that OWBPA has effectively overruled our deci-

sion in *Grillet v. Sears, Roebuck & Company*. In *Grillet*, the court held that when an employee agrees to release her employer from liability under the ADEA and receives benefits as consideration for the agreement, the employee ratifies the agreement if she retains the consideration after learning that the release is voidable. 927 F.2d at 220. Appellants alternatively argue that *Grillet* was erroneously decided and should be overruled. We treat each argument in turn.

The OWBPA and Ratification

Appellants contend that "[t]he language and purpose of the OWBPA preclude ratification of a release otherwise in violation of the OWBPA." The language upon which Appellants rely states that an individual "*may not*" waive any ADEA claim unless the waiver is knowing and voluntary within the meaning of section 626(f)(1) of title 29. (emphasis Appellants') Appellants read this language to mean that any waiver failing to meet one of the requirements under section 626(f)(1) is not simply voidable, but void and, therefore, unable to be ratified.

The doctrine of contractual ratification is the enforcement of a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise. RESTATEMENT (SECOND) OF CONTRACTS § 85(1981). To have ratification, there must be an antecedent contract that was previously voidable, but not avoided. A contract is voidable if there exist grounds upon which a party can avoid, or disaffirm, his duty of performance. *Id.* § 7. Such grounds have traditionally included fraud, duress, mistake and infancy. *Id.* § 7 cmt. b.

Ratification operates to allow a party having the power to avoid his contractual duty to make, or be deemed to have made, a new promise to perform his previously voidable duty and thus, extinguish his power of avoidance. *Id.* § 85 cmt. a. To say that a contract is voidable, there-

fore, is to say that an antecedent promise created a legal duty on the promisor's part and that the promisor has the power either to avoid performance, based on any one of the several grounds of avoidance, or to ratify the promise by making a new one.[7]

Promises that are void cannot be ratified. The reason for this is simple: Void promises are not legally binding and thus, are not contracts. *Id.* § 7 cmt. a. Without an antecedent contract to ratify, there can be no ratification. To say that a promise is void is to say that it created no legal obligation and that the promisor is without the power to bind himself under a new promise to perform the antecedent promise. *Id.* §§ 8 and 85 cmt. a.

We do not interpret the language of section 626(f)(1) to mean that a waiver which fails to meet the requirements of subsections (A) through (H) is void of legal effect. Rather, we interpret it to mean that such waivers are not knowing and voluntary and thus are subject to being avoided at the election of the employee. This interpretation comports with the language of section 626(f)(1) and is supported by the legislative history of the OWBPA.[8]

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[7] Note that if the same grounds for avoidance exist when the new promise is made, the party again enjoys the power to avoid performance under the new promise. REST.CONT. § 85 cmt. b. Where, however, such grounds no longer exist, ratification mandates performance of the new promise.

[8] The legislative history indicates that the fundamental purpose of the OWBPA waiver provisions is to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion, or mistake of material facts. S.REP. No. 101-263, 101st Cong., 2nd Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537. The circumstances against which these provisions were designed to protect are the same circumstances that have traditionally given rise to grounds upon which a party can avoid contractual obligations. That the Committee enumerated several of the traditional grounds of avoidance is significant. Also significant is the absence of any language in the statute and any statement in the legislative history indicating that a waiver executed in contravention of the OWBPA requirements is void of legal effect and cannot be ratified by an employee.

We also find that the provisions of section 626(f)(1) support our conclusion that defective waiver agreements are voidable and not void. Section 626(f)(1)(G) expressly provides that for seven days after execution of a waiver agreement an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day revocation period. If noncompliance with the other subparts of section 626(f)(1) rendered the agreement void, there would be no need for subpart (G).

Finally, an interpretation of section 626(f)(1) that renders defective waiver agreements void would be inconsistent with one of the expressed purposes of the ADEA: "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The simplest and easiest way to further this purpose is to give effect to private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation. Were employers forced to assume the risk that noncompliance with all of statutory requirements of section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions.[9]

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[9] The facts before us testify to this truth. The Plan which Champlin circulated to Appellants in early October 1990 contained a provision materially identical to the waiver agreement that each of the appellants executed. Thus, two of the appellants had almost two months and the others had almost three months to consider the Plan and their waiver of rights under the ADEA. Nevertheless, after executing the agreements and accepting the termination benefits as the consideration for their promises not to sue, each of the appellants filed suit, claiming that the waiver agreements were not "knowing and voluntary." Although, Champlin's documentary evidence shows it to have been in letter perfect compliance with section 626(f)(1) and to have lived up to its end of the waiver bargain, the nature of Appellants' attack on the agreements assured Appellants of a fact issue with which to avoid sum-

Therefore, we hold that neither the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA. When Appellants chose to retain and not tender back to Champlin the benefits paid them in consideration for their promise not to sue Champlin, they manifested their intention to be bound by the waivers and thus, made a new promise to abide by their terms.[10] *Grillet*, 927 F.2d at 220; *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 (4th Cir.1991); *In Re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir.1989); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir.1985). The court will enforce their new conduct based promises as it legally and equitably should.[11]

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mary judgment on this issue. Thus, were we to conclude that Appellants' waiver agreements were void from their execution, Champlin would be facing continued litigation with opponents who could use, and possibly already have used, to finance their suit, the very funds Champlin paid as consideration to avoid litigation.

[10] A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made. REST.CONT. § 2. That a promise has been made can be determined from conduct as well as words. REST.CONT. § 19. Here the conduct giving rise to Appellants' promise to perform under their waivers was their retention of the consideration for their waivers. That Appellants may have subjectively intended something different is of no moment.

> In the final analysis, the objective theory of contracts, as distinguished from the subjective theory, is based on analogy to estoppel. This is apparent whenever a person is held bound by a contract because of his manifestations when his manifestations are contrary to his actual state of mind.

1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 98, p. 362 (1957) (footnote omitted).

[11] Note that the court is not enforcing the promises contained in any of the allegedly voidable waiver agreements as such. What the court is enforcing is a new promise, evidenced by subsequent

Grillet and Hogue

Appellants alternatively argue that our decision in *Grillet* is contrary to the Supreme Court's decision in *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968). We disagree.

In *Hogue*, the Court held that a "tender back" of consideration paid by a rail carrier to one of its injured employees in exchange for the employee's release was not a prerequisite to the employee bringing suit on the injury. *Id.* 390 U.S. at 516-18, 88 S.Ct. at 1151-2. The Court reasoned as follows:

> [A] rule which required a refund as a prerequisite to institution of suit would be wholly incongruous with the general policy of the [Federal Employers' Liability Act] to given railroad employees a right to recover just compensation for injuries negligently inflicted by their employers. Rather it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee.

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conduct, to be bound by the terms of the original waiver agreements. Therefore, that the original waiver agreements may not have been in compliance with § 626 is of no consequence. The court is now concerned with the enforcement of a new promise which gives rise to a new legal obligation. As a new promise that creates a new obligation, it is not subject to the waiver requirements of § 626, and thus, such requirements pose no bar to its enforcement. Consequently, we find ourselves in respectful disagreement with the Seventh Circuit's recent decision in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir.1993), in which the court concludes, without any analysis of the doctrine of ratification, that "[n]o matter how many times parties may try to ratify [a waiver] contract, the language of the OWBPA, '[a]n individual may not waive', [sic] forbids any waiver." *Id.* 11 F.3d at 682 * 3. We believe that the court's conclusion in *Oberg* is at odds with the legislative history and congressional intent behind the OWBPA, *See* Note 8, *supra*, and overlooks the legal theories that define the doctrine of ratification of voidable contracts.

Id. 390 U.S. at 518, 88 S.Ct. at 1152 (citations omitted). The Court's holding is founded on the recognition that a "tender back" requirement would be "wholly incongruous" with the right of recovery provided under the FELA and inconsistent with the objectives of that Act. The right of recovery under the FELA, however, is unique in that it advances a congressional intention of facilitating recovery by injured railroad workers against their employers.

The FELA was designed not simply to discourage negligent conduct, for indeed, the common law at the FELA's passage provided rail workers an action for negligence. Rather, the Act was designed with a broader purpose in mind: "to provide liberal recovery for injured workers," *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382 (1957), and thus, "to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." [12] *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69

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[12] The FELA's legislative history testifies to this truth:

> [T]he employers' liability law . . . places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casualties to trainmen on the interstate railroads of the United States for the year 1908 was 281,645.
>
> It was the intention of Congress in the enactment of this law . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in the Taylor case (210 U.S. 281), "measurably control their causes."
>
> The passage of the original act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as congressional power can extend, those rules of the common law which the President, in a recent speech at Chicago, September 16, 1909, characterized as "unjust." President Taft in his address . . .

S.Ct. 413, 420, 93 L.Ed. 497 (1949) (concurring opinion of Justice Douglas). It accomplished these purposes by creating a statutory scheme that "stripped [an employer] of his common law defenses," and granted recovery if the "employer['s] negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-7, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1956). These dramatic changes evinced a clear congressional intent "favoring unburdened and expeditious recoveries" by rail workers. *Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir.1979).

The FELA's statutory scheme removed several of the common-law obstacles hindering the injured rail worker's "unburdened and expeditious recovery." The Supreme Court in *Hogue* removed yet another common-law obstacle to the rail worker's congressionally encouraged recovery. By so acting, the Court advanced the FELA's purposes of providing liberal recovery to injured rail workers and thus, of shifting from them to their employers the heavy loss associated with their severe injuries.

No such purposes underlie the ADEA. Congress expressly declared that the purposes of the ADEA were "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Unjustified

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referred "to the continuance of unjust rules of law exempting employers from liability for accidents to laborers."

This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident, to meet the modern industrial conditions and is based not alone upon the failure of those rules in the United States, but their failure in other countries as well.

GRIFFITH, THE VINDICATION OF A NATIONAL POLICY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, 18 LAW & CONTEMP.PROB. 160 (1953) (quoting from 45 Cong. Rec. 4041 (1910)).

discrimination on the basis of age was the problem targeted by the ADEA. To redress this problem, Congress provided employees a wholly new right of action for age discrimination. Nowhere in section 621(b) did Congress express, however, its desire to actively facilitate an ADEA claimant's recovery.[13]

What Congress did under the FELA was something it has not yet done under the ADEA, that is, to legislatively facilitate an employee/claimant's recovery. Until Congress demonstrates its desire to promote "liberal," "unburdened and expeditious recoveries" to claimants under the ADEA, *Grillet* will remain sound authority and unaffected by *Hogue*.

We also note that there are fundamental differences between settling a claim for personal injury or death under the FELA and settling a potential claim for a possible ADEA violation in connection with an employer's pre-announced program for reduction in force. In the FELA situation the injury has in fact already occurred; otherwise there is no FELA claim to settle. However, in an ADEA situation dealing with a prospective reduction in force, such as involved here, the purpose of the settlement agreement is to compromise in advance a potential age discrimination event and to offset in advance any loss and injury which an employee might experience if such an event were to occur.

Moreover, the FELA has effectively rendered liability of the employer a given in the great majority of cases,

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[13] We believe that the Seventh Circuit in *Oberg*, by adopting the reasoning of *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11 Cir.1992), and *Isaacs v. Caterpillar, Inc.*, 765 F.Supp. 1359 (C.D. Ill.1991), has improperly analogized the FELA to the ADEA and, thus, arrived at the erroneous conclusion that *Hogue* precludes a "tender back" requirement in suits brought under the ADEA. For the reasons set forth in this opinion, we consider these two "remedial" statutes to be fundamentally different in congressional purpose and intent. Consequently, we consider such an analogy inaccurate.

leaving quantification of damages as the principal focus of settlement negotiations. No such inference of liability exists as to ADEA claims; mere termination of employment is not sufficient to establish liability. An ADEA claimant faces the burdensome task of proving that the termination of his employment was the result of unlawful age discrimination. Therefore, the elements to be considered in the settlement of an ADEA claim involve not only damages, but also the more critical issue of threshold liability. Therefore, when (1) an employer presents his employee with a settlement agreement, the purpose of which is to resolve the issues of potential liability and damages under the ADEA, (2) the employee is given the opportunity to consider the agreement for a period of almost two months, and (3) the employer funds the agreed settlement consideration, thus performing its side of the bargain—all of which has occurred in this case, we believe justice and equity require the employee who seeks to avoid the obligations to which he agreed under the settlement agreement to return the consideration which he received for his promise not to sue.

CONCLUSION

In light of the foregoing, we AFFIRM the district court's judgment.

APPENDIX I

STATUTE INVOLVED

Section 201 of the Older Workers Benefit Protection Act added a new subsection (f) to Section 7 of the Age Discrimination in Employment Act. This provision, as codified in 29 U.S.C. § 626(f), states:

> (f) Waiver
>
> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—
>
> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or
>
> (ii) if a waiver is requested in connection with an exit incentive or other employment

termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2)

Supreme Court, U.S.
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No. 93-1605

In The

Supreme Court of the United States

October Term, 1993

ALLIED VAN LINES, INC.,

Petitioner,

v.

GERALD OBERG, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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The Older Worker Benefit Protection Act (OWBPA) provides that "no person may waive any right" under the Age Discrimination in Employment Act (ADEA) unless the waiver meets all requirements of the OWBPA. 29 U.S.C. §626(f)(1). The court of appeals for the Seventh Circuit held that this language means what it says. Hence the waivers obtained from respondents by petitioner Allied Van Lines, which ignored the OWBPA's central requirements, could not be enforced through "ratification" or any other doctrine that would render them effective to waive respondents' ADEA rights. The court of appeals also held that Allied could not recover the consideration it paid for these invalid waivers. The court rejected Allied's breach-of-contract theory for recovery of this consideration, because ineffective waivers cannot serve as the contract in a breach-of-contract damage suit. The court further held that Allied had waived all other theories of recovery by failing to present them in the district court.

These holdings are unassailable, and review should be denied.

STATEMENT OF THE CASE

Allied's group termination waiver program. Respondents Gerald Oberg, Nicholas Tautz, and Stephen Adams were part of a group of 65 employees involuntarily terminated by petitioner Allied Van Lines in a December 1990 reduction in force. The entire group was offered "Separation Agreements" which provided, in return for waivers, certain benefits over and above the company's standard

two-week severance benefit. The Agreements contained purported waivers of all claims against Allied "arising from and during employment or as a result of termination," including claims under the Age Discrimination in Employment Act (ADEA). The Agreements also purportedly waived the right to file any charge or suit under the ADEA. The Agreements provided that in the event of breach, the employee would forfeit any benefits still payable at the time of breach and would return benefits already received at the time of breach. Appendix to Petition (hereafter "App."), 2a-3a, 13a-14a.

At the time Allied carried out this group termination program, the waiver provisions of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. §626(f), were in effect. Under the OWBPA, if a waiver of ADEA rights is requested "in connection with an exit incentive or other employment termination program offered to a group or class of employees," the waiver is ineffective unless the employer, among other things, (1) allows affected employees at least 45 days to consider whether to sign the waiver, and (2) informs the employees in writing of "any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program", and "the job titles and ages of all individuals selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible for or selected for the program." §626(f)(1)(F), (H).

Allied did not give the terminated group 45 days to consider whether to sign the agreements. Nor did it give any of the information specified by the OWBPA about

individuals selected and not selected for the group termination program. App. 4a. Allied has never offered evidence explaining why it did not follow these two requirements.

After filing timely EEOC charges, respondents filed an ADEA class action challenging the terminations of Allied's reduction in force.

District court proceedings. Allied moved to dismiss or for summary judgment. It asserted that by retaining the benefits they had received when they signed their waivers, respondents had "ratified" those waivers and had therefore waived their ADEA rights even if the waivers failed to comply with the OWBPA. The district court denied Allied's motion. The court held that waivers that fail to comply with the OWBPA cannot be made effective through "ratification". The court certified this ruling for interlocutory review under 28 U.S.C. §1292(b). App. 26a-28a.

Allied then answered the complaint and counterclaimed against respondents. The counterclaim alleged just one claim: breach of contract. Allied alleged that by filing this lawsuit, respondents had breached the waiver provisions contained in their Separation Agreements. The counterclaim sought return of the consideration paid to respondents plus "consequential damages", including attorney's fees incurred defending this lawsuit.

Respondents immediately moved for summary judgment, arguing that the undisputed facts showed that the waivers were invalid under the OWBPA, and that no breach-of-contract claim could be based on invalid waivers.

The district court took up respondents' motion on September 23, 1992. App. 35a-65a. Because of the eight-month delay that had been caused by Allied's "ratification" motion, a potential limitations deadline was approaching for having class members opt into the suit. Respondents therefore asked for expedited consideration of their summary judgment motion as to the damage counterclaims. Allied's counsel resisted this request and claimed he needed three or four weeks to collect affidavits in opposition to the motion. The court pressed him to explain what facts Allied might dispute. App. 41a. Allied's counsel then stipulated to the facts on which respondents' motion was based: that the respondents had not been given the information specified in the OWBPA for group termination programs or the 45 days to consider the waivers. App. 41a-42a. Allied had already admitted that the respondents had been offered the waivers in connection with terminating a group of 65 people in a December 1990 reduction-in-force.

Because the court had ascertained that Allied did not dispute the facts on which respondents' summary judgment motion was based, and because the court had already decided that waivers not complying with the OWBPA could not be "ratified", the court requested argument on why the motion should not be summarily granted. In response, Allied's counsel asserted a single argument: that even if the waivers were invalid under the OWBPA, they could support damage claims for breach of contract. App. 46a. The district court was unconvinced, and declared it would dismiss the counterclaims. App. 60a.

On October 22, 1992, the district court issued an amended order granting summary judgment. App. 31a-34a. The court found that Allied had failed to follow the OWBPA's heightened time and disclosure requirements for waivers requested in connection with a group termination program. Hence respondents' ADEA waivers were ineffective under the OWBPA. *Id.* The court then concluded that no claim could be brought for breach of ineffective waiver provisions. *Id.* Because this ruling was closely related to the previous "ratification" ruling, which had already been accepted for interlocutory review by the court of appeals for the Seventh Circuit, the district court certified the counterclaim ruling under 28 U.S.C. §1292(b). *Id.*

The court of appeals accepted the counterclaim appeal and consolidated it with the "ratification" appeal. The United States Equal Employment Opportunity Commission filed a brief *amicus curiae* supporting respondents and participated in oral argument.

The court of appeals' opinion. The court of appeals affirmed both the "ratification" and the "counterclaim" rulings. The court first affirmed the district court's findings that the waivers had failed to comply with the OWBPA's requirements for group termination programs. App. 5a-6a. The court then held that under the unambiguous text of the OWBPA, waivers which failed to comply with the OWBPA cannot be enforced through "ratification." App. 7a. The court further rejected Allied's "tender back" variation on the "ratification" argument. App. 8a-10a.

The court also affirmed summary judgment against Allied's breach-of-contract counterclaims. The court first rejected a procedural argument (which the petition for certiorari has abandoned) based on F.R.Civ. P. 56(c). App. 10a-11a. The court then affirmed the district court's holding that waivers that are unenforceable under the OWBPA cannot be enforced through a breach-of-contract damage suit. App. 11a. The court also rejected Allied's "equitable restitution" theory for return of its consideration. It held that Allied had neither pleaded nor argued such a theory in the district court and had therefore waived it. App. 11a-12a.

Allied petitioned for rehearing. The petition abandoned the main arguments Allied up to then had asserted. On the issue of the effectiveness of the waivers, Allied dropped its "ratification" theory. Instead, Allied asserted that its waivers had not violated the OWBPA's requirements for group termination waivers, arguing that those requirements only apply when the employees volunteer for termination. (The petition for certiorari has abandoned this argument.) As to its money claim, Allied dropped its breach-of-contract argument. Instead, it limited itself to its claim for "equitable restitution," and argued among other things that the panel had erred in holding that claim waived. No member of the court of appeals voted to rehear the case. App. 67a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' "RATIFICATION" HOLDING IS PLAINLY CORRECT AND SHOULD NOT BE REVIEWED

The court of appeals held that ADEA waivers that violate the OWBPA cannot be enforced through "ratification." So clearly correct was this holding that Allied's petition for rehearing *en banc* did not challenge it. Allied likely would never have filed the present petition for certiorari if a panel of the Fifth Circuit had not subsequently and unexpectedly issued a contrary decision in *Walmsley v. Champlain Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993).

While *Walmsley* does conflict with the decision below, that alone does not justify this Court's intervention. These are the first two circuits to reach the "ratification" issue under the OWBPA. As of this writing, a petition for rehearing is still pending in *Walmsley*, supported by the EEOC *amicus curiae*. This Court frequently denies petitions for *certiorari* notwithstanding an isolated conflict between circuits – especially where the challenged decision appears plainly correct. Such is the case here. The decision below is compelled by the OWBPA's text, and it is the only result that respects the OWBPA's purpose.

A. The OWBPA's Waiver Provisions

Congress passed the OWBPA's waiver provisions out of concern that employers were unfairly obtaining waivers of ADEA rights from employees who were in no position to evaluate the claims they were being asked to

surrender. *See, e.g.*, Senate Report 101-79, 101st Cong., 1st Session, p. 9. Congress viewed these problems as particularly serious in reductions-in-force, where "the need for adequate information and access to advice before waivers are signed is especially acute." Senate Report 101-263, 101st Cong., 2d Session, p. 32 (emphasis in original). Congress also worried that because most such older workers are not highly paid, they often face economic distress, and therefore face acute pressure to accept any benefits dangled at them for a waiver. Senate Report 101-79, 101st Cong., 1st Session, p. 9.

Congress also concluded that the common law of waivers had failed to protect employees facing these problems. Some courts had held that challenges to ADEA waivers should be dealt with under "ordinary contract principles." *See, e.g., Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 541 (8th Cir. 1987). Other courts had fashioned a special "totality of the circumstances" test for ADEA waivers. *See, e.g., Cirillo v. Arco Chemical Co.*, 862 F.2d 448, 451-452 (3d Cir. 1988). Congress was dissatisfied with both of these judicial responses. See House Report No. 101-664, 101st Congress, 2d Session, p. 27.

To address these concerns, Congress fashioned the OWBPA's waiver provisions, 29 U.S.C. §626(f), reprinted at App. 87a-89a. For the first time under any federal statute, Congress has specified mandatory requirements for a waiver's form and substance. If even a single one of these requirements is not met, the waiver is declared ineffective to waive anything. §626(f)(1) says that "An individual *may not waive* any right or claim under [the ADEA] unless the waiver is knowing and voluntary," and that "a waiver *may not be considered knowing and voluntary*

unless at a minimum" it meets a long list of mandatory requirements. §626(f)(1) (emphasis added).

Eight of these requirements apply to any form of pre-lawsuit ADEA waiver.[1] In addition, Congress added two special requirements for group terminations. These requirements – the ones Allied ignored – are the heart of the statute. They apply whenever a waiver "is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees." In such cases, the employee must be given at least 45 days, rather than 21, to consider whether to sign. §626(f)(1)(F). Furthermore, the employee must be informed, in writing, of "any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program," and "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not selected for the program." §626(f)(1)(H).

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[1] Under §626(f)(1)(A) through (F), (1) the waiver must be in writing; (2) it must be written in a way calculated to be understood not only by the particular individual from whom it is requested, but by "the average individual eligible to participate"; (3) it must specifically refer to the ADEA; (4) it cannot waive rights or claims that may arise after the date it is executed; (5) the consideration for the waiver cannot include anything to which the individual is already entitled; (6) the individual must be advised in writing to consult with an attorney before signing; (7) except in group termination programs, the individual must be given at least 21 days within which to consider the agreement; and (8) the agreement must allow the employee seven days after signing to revoke it.

Nowhere does this comprehensive statute regulating ADEA waivers mention "ratifying" a waiver, or hint that "ratification" is possible. Nowhere does the OWBPA mention tendering back the consideration as a requirement for challenging a waiver in court, even though the statute contains detailed provisions regulating judicial proceedings hearing such challenges. §626(f)(3). At no point in the two-year Congressional consideration of the OWBPA did any committee, or any individual Senator or Representative, mention any such doctrine.

B. The OWBPA's Text Forbids Enforcing Noncomplying Waivers Through "Ratification"

The contract law of some states provides in some circumstances that otherwise ineffective waivers can be enforced through "ratification." The court of appeals treated two versions of this "ratification" doctrine. In one, the employee ratifies the waiver by accepting additional benefits after he or she has notice of the grounds for challenging the waiver. In the other, the employee ratifies the waiver by retaining benefits already received, instead of tendering back the benefits to the employer. In both versions of "ratification," the result is that the waiver is enforced and the employee waives his or her rights.

Where it exists, the "ratification" doctrine is riddled with exceptions. All states which allow "ratification" of waivers nonetheless hold that certain kinds of deficiencies in waivers cannot be "ratified." Different states follow different rules as to whether deficient waivers can be "ratified" and if so, which particular deficiencies (such as

fraud, duress, mutual mistake, failure of consideration) will render a waiver unratifiable. *See Isaacs v. Caterpillar*, 765 F.Supp. 1359, 1372 (C.D.Ill. 1991); *Taxin v. Food Fair Stores, Inc.*, 197 F.Supp. 827, 831 (E.D.Pa. 1961); Annotation, "Tender as a Condition of Action – Release", 134 A.L.R. 6.

The "ratification" doctrine has generally fared poorly in federal courts construing waivers under federal statutes. In *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968), this Court rejected the doctrine for waivers under the Federal Employers Liability Act, and the lower courts have almost unanimously applied *Hogue*'s holding to other federal statutes.[2]

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[2] The Eleventh Circuit applied *Hogue* to reject the tender/ratification doctrine under the ADEA. *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S.Ct. 412 (1992). The Fifth Circuit applied *Hogue* to reject the doctrine under the Jones Act. *Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979). The Ninth Circuit applied *Hogue* to 42 U.S.C. §1983 and stated that *Hogue* rules out the doctrine in waivers under any federal remedial statute. *Botefur v. City of Eagle Point, Oregon*, 7 F.3d 152 (9th Cir. 1993). See also *Wahsner v. American Motors Sales Corp.*, 597 F.Supp. 991, 998 (E.D.Pa. 1984) (Auto Dealers' Day in Court Act); *Taxin v. Food Fair Stores, Inc.*, 197 F.Supp. 827, 830-831 (E.D. Pa. 1961) (Sherman Act).

In *O'Shea v. Commercial Credit Corporation*, 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S.Ct. 177 (1991), and *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991), the Fourth and Fifth Circuits applied a "tender/ratification" doctrine under ADEA waivers, without citing or discussing *Hogue*. The Fifth Circuit subsequently adhered to *Grillet* in *Walmsley, supra*, holding that *Hogue* should be limited to the FELA. *Walmsley* is thus the first court of appeals' decision to refuse to apply *Hogue* to other federal statutes. As of this writing (April 29, 1994), a petition for rehearing in *Walmsley*, supported *amicus curiae* by the EEOC, has not been ruled on.

However, there is no occasion to apply the above state or federal common law to determine whether ADEA waivers can be enforced by "ratification" if they fail to comply with the OWBPA. The OWBPA's text answers that question, and the answer is no. That text could not be clearer. It says that an individual "may not waive" any right under the ADEA unless the waiver is "knowing and voluntary", and says that to be "knowing and voluntary", the waiver must satisfy *all* of the OWBPA's requirements. As the court of appeals held, "ratification" enforces a noncomplying waiver, results in waiver of ADEA rights, and therefore violates this plain language.

Allied argues that this plain language has an unwritten exception. According to Allied, all this language means is that if the OWBPA requirements are not satisfied, "the employer will not be entitled to insist on enforcing the waiver *as originally given*." Petition at 17 (emphasis added). Similarly, the Fifth Circuit in *Walmsley* interpreted the language to mean that "such waivers are not knowing and voluntary and thus are subject to be avoided at the election of the employee." App. 79a.

Neither Allied nor the Fifth Circuit tries to explain how such meanings are consistent with the statute's language. If a noncomplying waiver can be ratified through some subsequent action, such as receipt or retention of benefits, then the employee *may* waive ADEA rights through a noncomplying waiver, contrary to the text. Similarly, the statute says nothing about allowing an employee, at his or her "election", to make the waiver valid. If the statute allows an "election" to make the waiver valid, then the employee *may* waive an ADEA right, contrary to the text.

This text ends the issue. This Court instructs that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut National Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981).

C. "Ratification" Would Defeat the Purpose of the OWBPA's Group Termination Provisions

In seeking review, Allied offers "policy" arguments for grafting a "ratification" exception onto the unconditional text barring enforcement of a noncomplying waiver. "Policy considerations cannot override our interpretation of the text and structure of the act." *Central Bank v. First Interstate Bank*, ___U.S.___, 62 L.W. 4230, 4237 (1994). In any case, however, Allied's "policy" arguments carry no force. A "ratification" doctrine would contradict the purpose, and destroy the efficacy, of the OWBPA's group termination provisions.

First, even where employees are economically capable of tendering back the consideration they received when they signed the waivers, the "ratification" doctrine forces them to make a choice Congress said they do not have to make. Consider what happens to terminated employees like respondents, who give waivers but who never get the detailed statistical information the OWBPA specifies for group reductions. Under a "ratification" doctrine, those employees must later decide whether to keep the consideration, in which case they have waived their

claim, or to tender back the consideration and sue. They are forced to make that decision without the benefit of the information Congress said they were entitled to before deciding whether to waive their rights. (For example, as the district court noted, the present respondents, whom Allied says are barred by "ratification" from suing, have *never* received this information. App. 25a.) Thus, "ratification" would nullify Congress' scheme. It would force employees to decide whether to sue without the information Congress says is necessary to make the decision "knowing and voluntary."

Second, as the district court noted, the doctrine would encourage employers to ignore the OWBPA "in hopes that by the time their former employees discover that the waivers that they signed are voidable, they be in no economic position to tender back or refuse to accept special severance benefits accorded them." App. 25a. *Accord, Forbus v. Sears, Roebuck & Co., supra,* 958 F.2d at 1042; *Isaacs v. Caterpillar, Inc.,* 765 F.Supp. 1359, 1367 (C.D.Ill. 1991).

Against these policy considerations, Allied's arguments are weak. First, Allied says there is no basis to believe that "employees would be unable to tender back their enhanced severance payments if they were required to do so as a condition of maintaining their ADEA action." Petition at 20. This argument reflects a rosy, if not callous, view of the financial condition of older employees who lose their jobs without warning in reductions in force. The Congress that passed the OWBPA did not share that view. As discussed above, Congress was aware that most older workers are not highly paid and face terrifying financial insecurity when they are laid off.

As one court has put it, such workers are "unlikely to be able to put their severance payments aside for future 'tenders', or to be able to come up with the money to make such a tender at such later time as they acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirements." *Isaacs v. Caterpillar, Inc., supra,* 765 F.Supp. at 1367.

Second, Allied pooh-poohs the idea that "ratification" might induce employers to ignore the OWBPA. It says employers want to avoid litigation and therefore "have a strong incentive to ensure that releases are enforceable from the outset under the OWBPA." Petition at 20. But this desire to avoid litigation cuts two ways. Where a reduction in force has been discriminatory, employers have an incentive not to give employees the OWBPA-mandated information that would reveal a pattern of discrimination and lead to ADEA litigation. "Ratification" plays into such employers' hands.

Third, Allied claims that if employees can keep the consideration and still sue, that will encourage them to "manipulate" employers by continuing to receive installment payments on their releases while planning to sue them once the payments have been received. Petition at 13. The greater danger, however, is that of manipulation by the employer – and "ratification" encourages that manipulation. Allied typifies the employer who fears the consequences of giving terminated employees the OWBPA-mandated information about its reductions in force. The employer therefore decides to ignore the OWBPA. For relatively small amounts, it secures purported waivers, loaded (like Allied's) with impressive-looking legalese. The claims covered in these purported

waivers may be worth tens or hundreds of thousands of dollars. The employer knows the waivers are worthless, but hopes the employees will think them valid. If this tactic forestalls legal action during the ADEA's short 300-day limitations period for filing an EEOC charge, the employer is likely home free.

The district court had this situation in mind when it observed that such an employer gets "what it bargained for – a faulty waiver for special severance benefits." App. 26a. "Ratification" would provide a backup defense for employers who get caught in such manipulation.

Fourth, Allied claims that it is easy for employees to raise triable issues of fact as to whether the OWBPA has been violated. For example, Allied hypothesizes that employees will routinely raise disputes over whether the employer has properly defined the organizational units for the statistical information required by the OWBPA. Allied argues that unless "ratification" is imposed, employees will use their waiver payments to finance such a flood of litigation. Petition at 14.

The historical record refutes this flood-of-litigation scenario. The OWBPA has been on the books now for three and a half years. For most of that time, no case authority supported a "ratification" requirement, and much district court authority ruled it out. During this period, tens of thousands of laid-off employees have signed ADEA waivers, and thousands of ADEA lawsuits have been brought. Yet in this period there have been exactly *six* reported cases in the entire country challenging waivers under the OWBPA. And in all but one of those six cases, the court disposed of the OWBPA issue on

summary judgment by deciding whether or not the waiver met the OWBPA checklist.[3]

It is clear, therefore, that employers who (unlike Allied) conscientiously follow the OWBPA are successfully avoiding litigation. Whatever the status of the "ratification" doctrine, no rational plaintiff who has signed a waiver – and no rational lawyer for such a plaintiff – will bring an ADEA suit unless he or she can mount a substantial OWBPA challenge against that waiver. It is these substantial challenges that "ratification" acts to deter. Such deterrence is contrary to the intent of Congress. The OWBPA aims to encourage meritorious challenges to noncomplying waivers. For example, as part of its overturning of the common law of waivers, Congress inverted the traditional burden of proof, and required the *employer* to show compliance with the OWBPA's specific requirements once the employee raises a challenge. 29 U.S.C. §626(f)(3).

Fifth, Allied argues that employees will get a windfall if allowed to challenge their waivers while keeping their benefits. This argument is without merit. If the waiver is struck down and plaintiff wins the lawsuit, the benefits plaintiff received are offset against the recovery. *Hogue*, 390 U.S. at 518; *Forbus*, 958 F.2d at 1041. If the

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[3] The six cases (as of the present writing) are (1) the present lawsuit; (2) *Walmsley*; (3) *Carr v. Armstrong Air Conditioning*, 817 F.Supp. 54 (N.D.Ohio 1993); (4) *Pierce v. A. T. & Santa Fe Ry. Co.*, 1992 WL 368044 (N.D.Ill. 1992); (5) *Seroka v. American Airlines, Inc.*, 834 F.Supp. 374, 377-78 (S.D.Ala. 1993); and (6) *Collins v. Outboard Marine Corp.*, 808 F.Supp. 590, 594-595 (N.D.Ill. 1992). Only in *Walmsley* did the court find any dispute of fact as to whether the waiver complied with the OWBPA.

waiver is upheld, then defendant gets what it paid for – a valid defense against the merits of the lawsuit. See *Isaacs v. Caterpillar*, 702 F.Supp. 711, 715 (C.D.Ill. 1988).

Where the waiver is struck down but the employer prevails on the merits, the employer can at least complain that it paid plaintiff money for a waiver that did it no good. Petition at 16. But even the common law is unsympathetic to such complaints. As noted above, even in jurisdictions with "ratification" doctrines, there are categories of unlawful waivers that cannot be ratified, so that the plaintiff is allowed to keep the consideration while attacking the waiver. The same rule prevails under the OWBPA, which forbids ratification of noncomplying waivers. Moreover, employers obtaining noncomplying waivers either know or should know that they are circumventing an important statute designed to protect employee rights. Under the OWBPA, such employers pay out money at their own risk. When such employers demand their money back, they are in effect asking a court to give them another chance after having been caught the first time.

Now consider the other side of the coin. "Ratification" would confer a windfall on defendants. It would frequently stop employees from suing even where the employer (1) has violated the ADEA, and (2) has obtained waivers through violation of the OWBPA. In such cases, whenever terminated employees lack the money to make a tender, "ratification" lets defendants off the hook from double wrongdoing.

The complaint of "windfall" to employees from refusing to impose "ratification" is therefore weak, at

best, compared to the certain windfall the doctrine would give to wrongdoing employers. Faced with this choice, Congress declined to impose "ratification."

In short, the text of the OWBPA forecloses "policy" arguments. But if such arguments could be considered, they would crush Allied's position.

II. ALLIED OFFERS NO BASIS FOR REVIEW OF THE COURT OF APPEALS' "COUNTERCLAIM" RULING

The court of appeals held that because Allied's waivers are ineffective, they cannot serve as the contract in a damage claim for breach of contract. The court of appeals also refused to hear Allied's non-contract claims for "equitable restitution" of the consideration. It held that Allied had waived such claims by neither pleading them nor asserting them in the district court. No basis exists for this Court to review either holding.

The substantive holding. Allied's petition does not challenge the self-evident holding that damages cannot be obtained for breach of an invalid contract. There is no conflict in the circuits as to this holding. So far as respondents are aware, there is no precedent in American legal history that disagrees with it.

Allied appears to argue that the OWBPA allows employees to agree that if their waivers are held invalid, they will give back the consideration received in exchange for the waiver. Petition at 21. There is no need to answer this argument (which Allied never made in the district court or court of appeals), because respondents

made no such agreement with Allied. Nothing in the Separation Agreements contemplates that the waivers might be invalid, much less agrees to return of the consideration in the event of their invalidity. All the Agreements contain is a waiver of claims, a waiver of the right to file a claim, and an agreement to pay damages in the event of breach of either waiver:

> Breach of this Agreement shall constitute a forfeiture of additional benefits referenced. If those benefits have already been conveyed as of the time of the breach, the employee agrees that he/she will return these benefits.

App. 29a. It was this breach provision that Allied was trying to enforce in its counterclaims. As the court of appeals held, if the waivers are ineffective, Allied cannot get damages for their breach.

The procedural holding. The court of appeals held that Allied waived any claim for "equitable restitution" by neither pleading nor arguing any such theory in the district court. No argument exists for this Court to review this hornbook holding. Allied does not dispute that it never pleaded "equitable restitution" nor mentioned such a theory in the district court.

The "restitution" argument would have been meritless even if it had not been waived. Allied is arguing that even if respondents' waivers are ineffective, and even if respondents need not tender back the consideration in order to sue, Allied may maintain an independent claim for "equitable restitution" of the consideration. So far as respondents are aware, no federal or state court in America has ever held such a thing. Such a restitution claim

would be barred by the settled common law of restitution. *See* Restatement of Restitution (1937), §108(e); Restatement of Contracts, §§598-609.[4]

Moreover, allowing Allied an independent action for restitution of the consideration would in effect reintroduce "ratification" through the back door. If such a claim were allowed, the OWBPA would rule out ratification, or requiring a "tender" as a condition of bringing the suit, yet the employer would be guaranteed the right to recover its money.

In sum, no claim may be brought for recovery of money paid to secure waivers that fail to comply with the OWBPA – whether the breach of contract claim Allied asserted, or the "equitable restitution" claim it failed to assert. An employer like Allied who pays for a noncomplying waiver acts at its own risk. Any other rule would undermine the Congressional purpose of assuring that employers heed this statute, instead of ignoring it, as Allied did.

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[4] Section 133 of the Restatement of Restitution provides that if the other party is "privileged not to perform because of illegality", the first party can get restitution only "in accordance with the rule stated in the Restatement of Contracts, §§598-609." §598 of the Restatement of Contracts provides that "A party to an illegal bargain can neither recover damages for breach thereof, nor, by rescinding the bargain, recover the performance that he has ren-dered thereunder or its value, except as stated in §§599-609." None of the exceptions of §§599-609 even arguably applies to the present situation.

CONCLUSION

Respondents respectfully request that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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No. 93-1605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALLIED VAN LINES, INC.,
Petitioner,

v.

GERALD OBERG, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1605

ALLIED VAN LINES, INC.,
Petitioner,

v.

GERALD OBERG, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*. The written consents of both parties have been filed with the Clerk of this Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of

equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its association members, are subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), as well as other equal employment statutes and regulations. As employers, and as potential respondents to ADEA charges and other employment-related claims, EEAC's members are interested in encouraging the voluntary resolution of such claims.

Thus, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC represents. In essence, Respondents entered into a contract, declared the contract void, yet kept the benefit of the contract they say does not exist. Specifically, Respondents accepted special severance benefits in exchange for signing a general release of claims, including ADEA claims, and a covenant not to sue. They claim the release is void, yet have continued to retain the benefits even while filing suit under the ADEA. The court below ruled that because the releases arguably did not meet the minimum standards established in Section 201 of the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. § 626(f), Appellees were neither required to tender back the benefits as a prerequisite to filing suit nor deemed to have ratified the releases by retaining the consideration. Pet. App. 12a.[1] The court treats the consideration as a

[1] Citations to the Appendix to the Petition for a Writ of Certiorari are noted as Pet. App. ——. The opinion of the Court of Appeals for the Seventh Circuit below, reported at 11 F.3d 679, is reproduced as Pet. App. 1a-12a. The opinion of the district court, reproduced at Pet. App. 13a-34a, and an oral ruling of the district court, reproduced at Pet. App. 35a-65a, are not reported.

gratuity, which clearly was not contemplated by the original agreement.

This holding casts serious doubts on the finality of releases of claims and covenants not to sue under the ADEA. It allows plaintiffs to argue that their release is void and to sue the employer, but at the same time keep the benefit of the contract. As a result, employers who would not offer additional severance pay, early retirement incentives, and other termination benefits without the protection of a release, are likely to consider discontinuing such programs. Each discontinued program will harm the vast majority of individuals who receive such benefits and have no interest in filing discrimination charges.

Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in 1976, filed over 335 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in this case before the Seventh Circuit as well as in numerous other cases involving the validity of waivers under the ADEA.[2] In addition, EEAC has briefed a number of employment issues in this Court under the ADEA.[3]

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[2] *See, e.g., Oberg v. Allied Van Lines*, Pet. App. 1a (ratification/tender back); *Wamsley v. Champlin*, 11 F.3d 534 (5th Cir. 1993) (reproduced at Pet. App. 72a) (ratification/tender back); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *reh'g denied* (11th Cir. June 22, 1992), *cert. denied*, 113 S. Ct. 412 (1992) (ratification/tender back); *Adams v. Brown-Forman Corp.*, 963 F.2d 323 (11th Cir. 1992) (EEOC supervision not needed); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991) (ratification/tender back); *Cirillo v. Arco Chem. Co.*, 862 F.2d 448 (3d Cir. 1988) (EEOC supervision not needed); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987) (same); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986) (same).

[3] *E.g., Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (liquidated damages); *Gilmer v. Interstate/Johnson Lane Corp.*,

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on matters not previously brought to its attention by the parties.

STATEMENT OF THE CASE

In December 1990, Allied Van Lines ("Allied") underwent a general reduction in force in which over 60 employees were terminated, including Respondents. Pet. App. 2a. Allied offered departing employees their choice of two severance pay packages. One package offered two weeks' salary. The other provided approximately twenty weeks of additional pay in exchange for executing a "Severance Agreement." *Id.* The Severance Agreement included a general release, including a release of claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), and an agreement not to assert such claims. Pet. App. 3a, n.1. It also contained a commitment to return the benfits paid in the event of a breach of the agreement. Pet. App. 3a, n.2.

Respondents all chose to sign the Agreement and take the additional severance benefit. Pet. App. 2a. They also received continuing health benefits and pension contributions. Pet. App. 3a. Despite their having sued Allied, none of the Respondents has returned, or has offered to return, any of these benefits. Pet. App. 4a.

Shortly after receiving their last benefit payments from Allied, Plaintiffs filed ADEA charges against Allied

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500 U.S. 20 (1991) (enforceability of arbitration agreement); *Astoria Fed. Savs. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166 (1991) (effect of unreviewed state agency finding); *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989) (applicability to employer-provided benefits); *McLaughlin v. Richland Shoe*, 486 U.S. 128 (1988) (liquidated damages); *TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (liquidated damages).

with the Equal Employment Opportunity Commission ("EEOC"), claiming that they had been replaced by younger employees. Pet. App. 3a-4a. Before the EEOC completed its investigation, all three filed a class action complaint under the ADEA. Pet. App. 4a. Allied moved to dismiss, or in the alternative for summary judgment, arguing that Plaintiffs had ratified the releases by retaining the benefits and by failing to tender back the consideration. *Id.* The district court below denied the motion, and the Seventh Circuit affirmed. Allied now has petitioned this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit below allows Respondents to sign a contract, declare it void, and refuse to return the consideration. They have retained this benefit under false pretenses by treating the contract as if it never existed. The decision below conflicts directly with the decision of the Fifth Circuit in *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993). Indeed, the Fifth Circuit specifically expressed its disagreement with the decision below. *Id.* at 540 n.11 and 541 n.13. In *Wamsley*, the Fifth Circuit concluded that a release that may not meet the minimum requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f), is ratified if the plaintiff keeps the consideration. Thus, a potential plaintiff wishing to repudiate the release must first tender back the consideration. The Fifth Circuit also correctly observed that the Seventh Circuit's approach undoubtedly would discourage employers from offering releases and thus lucrative severance benefits and other incentives given in exchange.

This conflict creates substantial uncertainty in the law on an issue of substantial importance, particularly for employers doing business in both the Fifth and Seventh Circuits and elsewhere.

In addition, the Seventh Circuit misapplied this Court's 1968 decision in *Hogue v. Southern R. Co.*, 390 U.S.

516 (1968), under the Federal Employees Liability Act, 45 U.S.C. § 51 *et seq.*, to infer federal common law precluding ratification of ADEA releases and eliminating the tender back requirement. As the Fifth Circuit recognized in *Wamsley, Hogue* is not analogous because of the significant differences between the FELA and the ADEA. There was no dispute that Hogue ultimately would be due at least as much compensation as he already had received. The dispute was over whether his injuries were greater than originally perceived. The case involved a mutual mistake of fact, not a wholesale breach of a promise not to sue.

For these reasons, this Court should grant the petition, adopt the reasoning of the Fifth Circuit and reverse the decision below.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT A POTENTIAL ADEA PLAINTIFF WHO SIGNS A RELEASE OF CLAIMS NEVERTHELESS MAY DECLARE THE RELEASE VOID AND BRING AN ADEA LAWSUIT WITHOUT FIRST TENDERING BACK THE CONSIDERATION CONFLICTS DIRECTLY WITH THE FIFTH CIRCUIT'S DECISION IN *WAMSLEY v. CHAMPLIN REFINING AND CHEMICALS, INC.*, CREATING UNCERTAINTY IN THE LAW ON AN ISSUE OF SUBSTANTIAL IMPORTANCE

A. The Decision Below Conflicts Directly With The Fifth Circuit's Rule

In *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993),[4] a case substantially similar to this one, the Fifth Circuit ruled that an employee who has executed a release of claims including claims under the Age Discrimination in Employment Act, 29 U.S.C.

[4] The *Wamsley* decision is reproduced as Appendix H to the Petition (Pet. App. 72a-86a).

§ 621 *et seq.*, must tender back the consideration in order to avoid the release. *Id.* at 542. By retaining the consideration, the Fifth Circuit held, the employee by his conduct ratifies an otherwise voidable contract. *Id.* at 540.

In so doing, the Fifth Circuit specifically acknowledged that "we find ourselves in respectful disagreement with the Seventh Circuit's recent decision in *Oberg v. Allied Van Lines* . . . ." *Id.* at 540 n.11. Indeed, the Fifth Circuit considered, and rejected, each of the positions taken by the Seventh Circuit below.

B. As The Fifth Circuit Correctly Observed, The Seventh Circuit's Ruling Will Discourage Employers From Voluntarily Making Such Offers

The Fifth Circuit decision points out that an interpretation making void defective ADEA releases "would be inconsistent with one of the expressed purposes of the ADEA: to 'help employers and workers find ways of meeting problems arising from the impact of age on employment.'" 11 F.3d at 539 (Pet. App. 80a) (quoting 29 U.S.C. § 621(b)). "The simplest and easiest way to further this purpose," the Fifth Circuit stated, "is to give effect to private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation." *Id.* Accordingly, the Fifth Circuit continued:

> Were employers forced to assume the risk that noncompliance with all of [the] statutory requirements of section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions.

Id.

The Fifth Circuit is quite correct. Like Allied, many employers who are faced with the necessity of workforce reductions offer lucrative severance benefits, far in excess

of any to which the employees otherwise would be legally entitled, to ease the impact of lost employment. These programs offer substantial financial benefits. Some employers, depending upon financial circumstances and other considerations, also offer early retirement incentives and other voluntary termination programs in lieu of layoffs.

Because these employers voluntarily are offering benefits considerably greater than they are legally obligated to pay, they frequently require that the employees who choose to receive these additional benefits execute a release of claims in return. Of course, an employee cannot be forced to sign a release against his or her will, but those who do not sign will not receive the additional benefit. In this manner, the employer buys peace, and employees who choose to participate receive a substantial benefit.

The decision below, as the Fifth Circuit noted, would allow disgruntled former employees to renege on the commitment they made while retaining the consideration paid to them in exchange for that commitment. Merely by alleging that the minimum requirements of the OWBPA were not met, they could circumvent their promise and plunge the employer into litigation. Indeed, the decision below encourages plaintiffs and their counsel knowingly to sign releases that do not comply with the OWBPA in order to receive benefits to which they are not otherwise entitled, even though they have no intention of honoring the release agreement.

This unfair result so limits the utility of waivers that they would become virtually useless to employers. As the Fifth Circuit recognized, it follows that employers who choose not to provide additional severance benefits without a release in return simply will cease offering such benefits.

Since force reductions still may be a financial necessity or business option from time to time, however, layoffs will still occur—but without the additional severance ben-

efits offered in the past. As a consequence, the many employees who face layoffs but have no grounds to challenge their terminations will be deprived of a substantial payment that might mean the difference between financial security and financial peril.

C. The Conflict Between The Circuits Causes Substantial Uncertainty In The Law

The wholesale disagreement between the Fifth and Seventh Circuits on the ratification/tender back issue causes substantial uncertainty for the major employers who are EEAC's members. Many of these employers have operations in numerous states. Thus, it is not unusual for the same employer to do business in Louisiana, Mississippi or Texas, which comprise the Fifth Circuit, and also in Illinois, Indiana and Wisconsin, in the Seventh Circuit.

The conflict between the Fifth Circuit's *Wamsley* decision and the Seventh Circuit's decision below results in an untenable situation for employers who do business in both circuits. An employer implementing a corporate-wide force reduction, for example, may find it worthwhile to offer generous severance benefits to employees in Dallas who sign releases, but not to offer similar benefits to employees in Chicago who do so, since the Chicago employees can keep the consideration and proceed with ADEA lawsuits. Some employers may opt to avoid this inequity by ceasing to offer special severance benefits in either circuit.

Employers doing business in other circuits also face inconsistency in the law surrounding releases. In cases arising prior to the effective date of the OWBPA, two other circuits issued conflicting opinions. The Fourth Circuit, in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991), ruled that the ratification/tender back doctrine applies to bar an ADEA claim where the employee has failed to return the consideration. Conversely, in *Forbus v. Sears, Roebuck and Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*,

113 S. Ct. 412 (1992), the Eleventh Circuit ruled to the contrary.[5]

Accordingly, employers who are considering offering severance benefits or exit incentives in exchange for a release are left with no clear direction. They know the enumerated OWBPA requirements for a valid release of ADEA claims. Yet they also know, as one commentator has stated, that "[t]he nature of some of the OWBPA conditions . . . may make achieving-and proving-compliance more difficult than it seems and could undermine the certainty and expense control that a release agreement is designed to afford." Glen D. Nager and Steven T. Catlett, *Employees Can't Have Their Cake and Eat It Too: Estopping Age Discrimination Complainants Who Have Signed Releases*, 19 Employee Rel. L. J. 295, 296-97 (1993). For example, a prospective plaintiff can raise a factual issue concerning the validity of the release merely by alleging, as the plaintiffs did in *Wamsley*, that they were told orally they had less time than the statutory minimum to consider and sign the release. Yet, the courts of appeals differ greatly on whether the plaintiff will be permitted to retain the benefits of his bargain while repudiating the obligations.

D. Unlike The Seventh Circuit, The Fifth Circuit Correctly Concluded That A Release That May Not Comply With The Older Workers Benefit Protection Act Is Ratified If The Plaintiff Keeps The Consideration

Section 201 of the Title II of the Older Workers Benefit Protection Act (OWBPA) amended the ADEA to es-

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[5] Indeed, this conflict already has subjected the same company to opposing decisions. *Compare Forbus v. Sears, Roebuck and Co.*, 958 F.2d 1036 (11th Cir.) (tender back not required/no ratification), *cert. denied*, 113 S. Ct. 412 (1992), with *Grillet v. Sears, Roebuck and Co.*, 927 F.2d 217 (5th Cir. 1991) (release ratified due to failure to tender back consideration). Both of these cases involved ADEA releases executed before the effective date of the OWBPA, and both involved Sears, Roebuck and Company.

tablish minimum standards for a waiver of claims. 29 U.S.C. § 626(f).[6] The statutory language states that:

> An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. . . [A] waiver may not be considered knowing and voluntary unless at a minimum [it meets the established standards].

Id. Because of the "may not waive" language, the Seventh Circuit below concluded that a waiver that did not meet the minimum standards was incapable of being ratified. Pet. App. 6a.

In a carefully reasoned analysis, the Fifth Circuit disagreed that this language precludes ratification. As the Fifth Circuit explained:

> We do not interpret the language of section 626 (f)(1) to mean that a waiver which fails to meet the requirements of subsections (A) through (H) is void of legal effect. Rather, we interpret it to mean that such waivers are not knowing and voluntary and thus are subject to being avoided at the election of the employee. This interpretation comports with the language of section 626(f)(1) and is supported by the legislative history of the OWBPA.

11 F.3d at 539 (Pet. App. 79a).

Accordingly, the Fifth Circuit reasoned, an arguably defective release can be ratified through subsequent conduct. As the Fifth Circuit pointed out:

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[6] The requirements include: (1) an understandable written agreement; (2) with a direct reference to the ADEA; (3) that operates only retroactively; (4) in exchange for consideration. In addition, the individual must be given (5) written advice to consult an attorney and the requisite period of time to make and revoke a decision, and a seven-day revocation period. 29 U.S.C. § 626(f)(1). There are additional requirements where the waiver "is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees." *Id.*

> Note that the court is not enforcing the promises contained in any of the allegedly voidable waiver agreements as such. What the court is enforcing is a new promise, evidenced by subsequent conduct, to be bound by the terms of the original waiver agreements. Therefore, that the original waiver agreements may not have been in compliance with § 626 is of no consequence.

11 F.3d at 540 (Pet. App. 81a-82a n.11). The Seventh Circuit, in contrast, held in effect that a waiver that fails to meet the minimum OWBPA standards is void *ab initio* rather than voidable and thus cannot be ratified. Nevertheless, the Seventh Circuit allowed the plaintiffs to retain the consideration they received.[7]

As the Fifth Circuit noted, the Seventh Circuit's holding below fails to take into consideration several key elements indicating that Congress intended potentially defective ADEA waivers to be voidable, not void. Neither the statute nor the legislative history of OWBPA bars application of the ratification/tender back doctrine. 11 F.3d at 539 n.8 (Pet. App. 79a n.8). Under well-accepted principles of statutory interpretation, "where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2169-70 (1991) (citations and quotations omitted).

Moreover, Section 626(f)(1)(G) specifically provides for a seven day revocation period following execution of

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[7] Indeed, the dispute over whether a contract is void (and cannot be ratified) or voidable (and can be ratified) may be a bit too esoteric. Under either analysis, the plaintiff is trying unjustly to keep the proceeds of a contract which he says does not exist. But the money would not have been received by the plaintiff unless he had agreed to the contract in the first place. A typical employer will conclude that the situation is obviously unfair and will have to consider whether to give additional severance pay under such circumstances. *See* part I.B. above.

the agreement, during which the agreement is neither effective nor enforceable. 29 U.S.C. § 626(f)(1)(G). If failure to comply with another requirement made the agreement void, there would be no need for this section. 11 F.3d at 539 (Pet. App. 80a).

Thus, EEAC urges the Court to grant the petition and reverse the Court below, adopting instead the analysis used by the Fifth Circuit in *Wamsley*.

II. THE DECISION BELOW INCORRECTLY APPLIES THIS COURT'S DECISION IN *HOGUE v. SOUTHERN R. CO.* TO DENY EMPLOYERS THE CERTAINTY GRANTED BY THE RATIFICATION/TENDER BACK DOCTRINE

The court below misapplied this Court's decision in *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), to reach the conclusion that the common law ratification/tender back doctrine should not apply to ADEA releases. Indeed, the Fifth Circuit in *Wamsley* considered and rejected the applicability of *Hogue* to the issue presented here, specifically disagreeing with the court below. 11 F.3d 534, 540-42 and n.13 (Pet. App. 82a-86a).

A. *Hogue* Interprets The FELA, Which Provides A Type Of Workers' Compensation For Railroad Employees

Hogue involved a claim under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA). In *Hogue*, a worker who injured his knee while working for the defendant railroad relied on the railroad's doctor's assurances that his injury was only a bruise. He signed a release in exchange for $105. Later, after two operations including removal of his kneecap, he sought to reopen the claim but did not return the original $105. When the railroad sought to enforce the release, this court concluded that "a tender back is . . . not requisite when it is pleaded that the carrier and the employee entered into the release from *mutual mistake* as to the *nature and ex-*

tent of the employee's injuries." *Hogue*, 390 U.S. at 517 (emphasis added).[8]

The Court's ruling in *Hogue* is not surprising. The FELA provides a cause of action closely approximating workers compensation for railroad employees injured on the job.[9] The FELA "was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958). As the Court has explained, "[t]he cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier." *Id.* It would have made no sense to make Hogue give back the $105, as all agreed he was entitled to at least that much compensation.

The FELA effectuates this purpose by providing a remedy for an injured worker in virtually any situation where the employer's negligence was even remotely a contributing cause of the injury.[10]

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion

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[8] Instead, the Court directed, the original amount should be deducted from the ultimate award. *Hogue*, 390 U.S. at 518.

[9] While the FELA is not a true "workers compensation" scheme imposing liability without fault, *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957), it is "an avowed departure from the rules of the common law . . ." *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958) (citing *Rogers*, 352 U.S. at 507-509).

[10] The operative provision, 45 U.S.C. § 51, states:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

> that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played *any part at all* in the injury or death."

Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506-07 (citations omitted) (emphasis added). *See also Webb v. Illinois Cent. R.R.*, 352 U.S. 512, 516 (1957); *Krienke v. Illinois Central R.R.*, 249 F.2d 840, 844 (7th Cir. 1957). Traditional common law defenses such as contributory negligence, assumption of the risk, and the fellow servant doctrine are unavailable under the FELA.[11] Instead, "[t]he burden of the employee is met, *and the obligation of the employer to pay damages arises*, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference [that negligence of the employer played a small part in the injury]." *Rogers*, 352 U.S. at 508 (emphasis added). Thus, entitlement to damages for an FELA claim is significantly less difficult to establish than in other fault-based litigation.

B. Because Of The Significant Differences Involved, *Hogue* Is Inapposite To The Case At Bar. As Hogue's Damages Could Not Be Less Than Already Received —No Tender Back Was Needed

The court below grafted the *Hogue* holding onto a situation far different from the one that *Hogue* actually addressed. Because the actual issues, as well as the two statutes in question, have virtually nothing in common, the

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[11] 45 U.S.C. § 53 (contributory negligence); 45 U.S.C. § 54 (assumption of the risk); 45 U.S.C. § 51 (fellow servant doctrine).

decision below incorrectly applied *Hogue* to the situation presented here.

In *Hogue*, the "mutual mistake" was as to the nature and extent of the injuries. 390 U.S. at 516. Liability was not at issue. The issue to be resolved was the extent of Southern Railway's liability *beyond* the first $105. Thus, Hogue was entitled at least to the $105 under all circumstances, and there was no reason to require that he tender back the first installment. Indeed, tender back was not even a legitimate issue.[12]

In contrast, while Respondents could have chosen to retain their rights to assert the liability of Allied Van Lines in the instant case, they voluntarily chose to forego that option in return for a large amount of money. Respondents were not entitled to the amount at issue except as consideration for their agreement to release all claims and covenant not to sue. The consideration was not in satisfaction of any existing predetermined obligation. There was no common agreement that the plaintiffs were entitled to a minimum specific amount as compensation for an admitted statutory injury, and there was no mistake of fact as to the amount due. In contrast to *Hogue*, there is a substantial question whether Respondents were victims of age discrimination at all or would be entitled to *any* compensation from Allied on their age discrimination claims. Rather than face the uncertainty of litigation, Respondents agreed to accept this consideration.

Moreover, as the Fifth Circuit pointed out in *Wamsley*, the court below followed *Hogue* without considering the differences between the FELA and the ADEA. 11 F.3d 534, 541 n.13 (Pet. App. 85a). Instead, it relied solely on the general observation that both are "remedial" statutes and thus should be treated alike. Unlike the "resource allocation" approach taken by the FELA, however,

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[12] Notably, moreover, the employer in *Hogue* did not file a brief or present argument on the "tender back" issue. *Hogue*, 390 U.S. at 516.

the ADEA provides a remedy only where an employer has engaged in an unlawful employment practice. 29 U.S.C. § 623(a). The FELA was intended to "adjust[] the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden," S. Rep. No. 460, 60th Cong., 1st Sess. 3, *quoted in Sinkler*, 356 U.S. at 330 (1958). By contrast, the ADEA's prohibitions are intended "to promote employment of older persons based on their ability rather than age; to prohibit *arbitrary* age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment. 29 U.S.C. § 621(b) (emphasis added).

Indeed, to prevail in an ADEA claim for discriminatory termination, for example, "the plaintiff must ultimately prove that she was discharged because of her age." *Anderson v. Stauffer Chem. Co.*, 965 F.2d 397, 400 (7th Cir. 1992). Unlike the FELA—where the plaintiff need only show that the employer's conduct played only the "slightest" part in the injury—the plaintiff in an ADEA case must prove "that age was a 'determining factor' or a 'but for' element in the employer's decision." *Id.* (quoting *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984)). *Cf. St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2751 (1993) ("[W]e have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*.") (emphasis in original).

Thus, while the FELA effectively allocates damages to the employer based on ability to pay, the ADEA imposes liability only where the plaintiff proves not only that the employer's conduct affected the plaintiff, as under the FELA, but also that the plaintiff's age was involved in the employer's action. Accordingly, as a practical matter, recovery by a railroad employee who is injured on the

job is far more probable than an employee who claims that an adverse employment action was based on age.

Thus, *Hogue* is decidedly inapposite to the case presently before this Court, and its use by the Seventh Circuit is having a decidedly negative impact on the continued use of severance pay. While *Hogue* may represent "federal common law" under the FELA, it does not follow that *Hogue* should be applied to every situation where the obligation to tender back consideration for a release is the issue. For the reasons stated above, it should not be applied in the circumstances presented in this case.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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